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Early History

of the

Federal Supreme Court

By
W. H. Muller

Boston
The Chipman Law Publishing Company
1922

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Printed in the United States of America
The Riverdale Press, Brookline, Boston, Mass.

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FOREWORD

We owe much to the marvelous courage and to the prophetic faith of the justices of our early Supreme Court; we owe much to the statesmanship and to the courage of our judges of to-day. There was a danger that the struggle for independence would be a mere revolt; Washington and Hamilton made it a revolution. There was danger that it would be a mere throwing off the restraints of the past and that it would result in civil war and in anarchy. The justices of the Supreme Court laid the foundation for "a land of settled government" and for a progressive but at the same time a permanent democracy. It was their vision of America and it was their great courage in asserting their powers, which made the United States a self-contained and virile nation rather than a feeble federation of jealous and warring states. It was they who gave us a government of law and not of men and who laid the foundation for and who made possible the far-flung battle line of our great but cosmopolitan democracy.

To many in those early days all that appeared necessary to a social and industrial millenium was to abolish the restrictions of the past. They had protested against the navigation acts, the trade monopolies, the continental system and the abuses of the royal prerogative; they had insisted upon their personal rights; they were

pioneers and the children of pioneers, and the pioneer is always an individualist; many of them were protestants and the children of protestants, and the protestant was always opposed to centralization. There was a danger that our fathers would be satisfied with talking of liberty and would desire it only for themselves; that they would guarantee the freedom of the states and of the individual but would leave it to the states and to the individual to enforce the rights which had been guaranteed. There was a danger that there would be a league of peace rather than a lasting guarantee of peace; that the Supreme Court would be an American Hague Tribunal with no right or power to enforce its decisions, and that, like the treaties and the international law of the old world, the Federal Constitution would be deemed to contain more recommendations of conduct and mere declarations of rights which a well-organized and militant minority or a temporary majority could at any moment repudiate and set aside.

Judicial control in America has not, as some would have us believe, been an autocracy, but the world's most wonderful illustration of a triumphant democracy. The faith of our judicial fathers was a democratic faith. They believed that we intended to say what we had actually said, that we intended that the guarantees of the Constitution should be enforced, that we really desired a government of law and not of men, and that when we created a democ-

racy we believed in a democracy. They believed that democracy would vindicate itself. They had the courage and the democratic faith to act upon the supposition that the sense of law and of order would be so strong among us that even sovereign states would obey judicial decrees. Though their seven members were individually powerless, though they had no army and no power to raise an army, they not only believed but acted upon the belief that the common sense, the democratic comradeship and the sense of law and of order of the people as a whole would expect and would insist that their judgments should be obeyed, and that, if the occasion ever arose, an unorganized nation would organize to enforce obedience. They had the faith which at the beginning of the World War was the faith of Belgium. Belgium believed in a government among nations of law, and not of the heaviest battalions; she believed in the supremacy of treaties and of international law, and above all she believed that the sense of law and order and of right and justice was so strong in the civilized nations of the earth that, in case of a flagrant violation of treaty rights and of international law, the world's unorganized democracy would take up arms. The Prussian hierarchy believed that there could be no government by law unless there was immediately at hand and always existing an organized force to enforce it. Belgium believed that the people of the earth would insist

that God was God and the law was law and that democracy could and would organize. This is the faith of America; this was the faith of our fathers.

How fortunate it was that our early judges had time for deliberation! How fortunate it was that there were no cases to be decided at their first and second sessions, and that at the third only one case came up for discussion! They were able to think and to plan, to survey the whole field, to consider the construction they should place upon the Constitution, to consider the limitations and the scope of their powers, and they were able to gradually sense the popular mind and the popular sense of law and of order. They were able to scan the field of the common law and to determine how much was applicable to our new world and to a young and evolving democracy. They were able to develop sanely and thoughtfully a common law of their own.

Many think that the Constitution was the work of a moment and that the jurisdiction of the Supreme Court of the United States was hastily and arbitrarily assumed. Gladstone no doubt said that the American Constitution was the most wonderful document that had ever been written by the hand of men at one time, but he didn't say that it was the work of the moment, or the result of the thought of the moment. He realized as every thoughtful man realizes, but so many of our newer citizens and

social enthusiasts do not realize, that back of it was the thought and the experience of the ages. We need to realize how carefully our earlier judges, and as a matter of fact the judges of our later day, have felt their way, how anxious they have been to retain the present popular support, but how courageous they have been in hazarding that support when the irresistible logic of events and the overwhelming fact of nationality has required that hazard. The courage that was evidenced by the decision in *Chisholm v. Georgia* was magnificent, and so to-day is the courage that is shown in every decision of the United States which settles the controversies of sovereign states, or which holds the hands of tens of thousands of citizens. All government in the last analysis is founded upon force, the question is ever present whether after all the sense of law and of order is so strong in the community or in the nation that men and women will obey a court's decree and that, if need be, the unorganized electorate will take up arms and will support it.

The history of the Supreme Court of the United States is a marvelous record. Its decisions have controlled sovereign states and its decrees have settled controversies which in Europe would have meant civil war. Without it there could have been no nation.

It is well for us in these later days to ponder over the beginnings of America, to realize how difficult was the problem but how sure were the

foundations. There have been other great confederations, but never before was there the vision of a vast cosmopolitan democracy which should be bound together not by the force of arms, but by the comradeship which comes from a just and impartial and at the same time a democratic reign of law.

ANDREW A. BRUCE.

Minneapolis, Minn.

PREFACE

The conditions surrounding the beginning of a great institution, whatever its nature, always excite a peculiar interest. We see the developed organism and inquire how it was conceived, planned, and built up. Who, we ask, laid the foundations? What thought, energy, labor, and perseverance entered into it and brought about its present power, efficiency, and influence? Especially is this true of the Federal Supreme Court, that great and august tribunal which is to-day the final arbiter of the destiny of more than one hundred and ten million people and whose influence extends to all parts of the world where the English Common Law is the basis of jurisprudence. Whence this great power and influence? What master minds in its early days caught a vision of the tribunal that was to be and made possible its future greatness? Truly, the Great Chief Justice perhaps more than any single individual of his day, or of any other day, unless it be the late Chief Justice White, left the impress of his character, courage, and learning upon it; but when we consider the problems which faced the court during the first years of the new government, when, without even a rule of court or a single precedent to

guide, those courageous pioneers who were first elevated to the Bench commenced to blaze the trail towards constitutional government and liberty, we cannot but feel great pride in and admiration for their achievements.

In the following pages I have tried to present some of the problems and show what progress had been made towards solving them, up to the time Chief Justice Marshall was appointed, as well as to give short sketches of the lives of the justices. In doing this I have used freely the Official Reports of the Court, Lewis's Great American Lawyers, Beveridge's Life of Marshall, and several histories and reference works. The study has been extremely interesting and I trust that the result will serve to remind the members of the Bar of the great services rendered posterity by those early statesmen and jurists.

W. H. MULLER.

Dillon, S. C.

Early History of the Federal Supreme Court

CHAPTER I

INDEPENDENCE AND ITS PROBLEMS

When Richard Henry Lee of Virginia in the Continental Congress on the seventh day of June, 1776, moved that a resolution be adopted declaring "That these United States are, and of right ought to be, free and independent states," he uttered not only a consummation to which the progress of events of the past decade had pointed, but gave words to an issue the results of which would bring about many serious complications which in the end only war would settle. About them, in the years to come, political parties would form, courts would be called on to make adjudications, theorists on government would write, long and bitter debates would occur, and finally their solution would be submitted to the

arbitrament of the sword. At that time, however, these matters gave no serious concern. The energies of those who hoped for independence, as well as those who hoped for eventual compromise and recognition of their rights without severance from Great Britain, were devoted to protecting the country from acts of oppression which had been planned against it. In relief from these, without consideration of future problems, the people, carried along by the burning eloquence of Patrick Henry, stirred to action by the "Farmers' Letters" of John Dickinson and by other pamphleteers, and influenced by John Hancock, Samuel Adams, Benjamin Franklin, and others, saw their only hope for future liberty.

The causes leading to the final rupture between the States and England are well known. With the founding of the colonies, whether under charter or by proprietors, the people brought with them and adopted in this country, so far as they conceived them to be applicable, those social, economic, and political customs and usages with which they were familiar and in accordance with which they had lived in the mother country. However, the purposes which brought many of them here, such as religious freedom and relief from a dominant aristocracy, necessitated many changes in social custom; the undeveloped condition of the country with its resultant lack of markets, commercial intercourse, transportation facilities, and the rigorous effort required to gain a live-

lihood brought about changed economic and industrial relations; the isolated condition of the people and their necessary self-reliance stimulated and required local self-government; but it was neither the wish nor intention of the great majority, so long as their rights were recognized, to become other than British subjects. To the mother land they were bound by ties of blood, tradition, and laws. They recognized the sovereignty of the British king and admitted the sanction of those laws of Parliament which pertained to the general welfare of the kingdom. Being British subjects they claimed the right to all the privileges and immunities of such subjects. They felt themselves the inheritors of all of those grants and laws which through the ages the English people had been able to wrest from their kings and which had been established for the preservation of life, liberty, and property. Those limitations upon arbitrary power secured by the Magna Charta were of equal force in the colonies and in England, and the benefits flowing from the writ of habeas corpus and those other great statutes enacted by the Parliament inured to the benefit of Americans as well as Englishmen.

They gloried, too, in the achievements of the English nation. Her triumphs were their triumphs, her successes their successes. They looked to her largely as the source of their educational and cultural life, and her accomplishments in art, science, and literature filled them with pride. Her victories on land and sea were

65
21 | their victories. The great majority of the people were entirely loyal. Hence, they were willing also to bear their part of the burdens of the empire, provided the assumption was not thrust upon them in violation of their legal and political rights. So long as the aid furnished was voluntary and self-imposed they could be counted on to do their part. This attitude is evidenced by the fact that in the final contest between the English and French for supremacy on the American continent the States furnished and maintained at their own expense an army of approximately twenty-five thousand officers and men who were largely instrumental in bringing success to the English standard.

Such was the status of affairs at the close of the Seven Years' War; such the feeling of patriotism when George III came to the throne in 1760. A changed attitude, however, quickly appeared. Although victorious, the British nation was burdened with debt; taxes were high and the prospect was that they would go higher; this in spite of the fact that repeated promises of reduction had been made. Under such circumstances it became necessary to find some new source of revenue, and no field seemed so promising as that of the American colonies, which were growing rapidly in population and wealth. On the part of England the right to make the imposition does not seem to have been seriously questioned, although there was much consideration as to the method. For many years there had been in existence the unenforced naviga-

tion laws which could be used as a beginning and under which the commerce of the colonies could be controlled. Thus, by forcing them to trade with the mother country in those products which she could use to advantage, benefit would accrue. This, however, was not sufficient, and the Bute ministry conceived the Stamp Act, which was subsequently passed under the leadership of Grenville. It met with a storm of opposition in America, culminating in the passage of Henry's famous resolutions in the Assembly of Virginia, vigorous protests in the other colonies, and finally in the convocation of the Stamp Act Congress. So savage was the resistance that the Act was repealed, but the subsequent ministries continued to claim the right to tax the colonies.

Taxation, however, was not the only source of conflict. Violation of charter rights, the attempted establishment of an Anglican bishopric in America, the sending out of revenue collectors, the stationing of troops in the country at the expense of the colonies, the claim of right to carry Americans to England for trial, the closing of American ports, and numerous other acts on the part of the English Government, all had their result in Lexington and Bunker Hill.

The idea of independence was not first advanced in the Congress of 1776. While it may be true, as has been stated, that "the controversy preceding the war gradually shifted from one primarily upon economic policy to one upon

issues of pure politics and sovereignty, and the Acts of Congress as viewed to-day seem to have been carrying it from the beginning inevitably into revolution, but there was apparently no general and conscious drift toward independence until near the close of 1775," yet many of the leaders had necessarily seen that the course of events must eventually lead to that result. Submission was impossible, recession on the part of the English Government highly improbable, hence independence was the only solution of the controversy. Passing over the Mecklenburg Declaration of Independence of May, 1775, it is authentically established that in April 1776, North Carolina authorized its representatives in Congress to join with the representatives of the other colonies to declare the colonies free and independent, and Virginia had instructed her delegation to frame and offer in the Congress a resolution to that effect. Lee's motion was a result of those instructions. That it was timely is apparent from the feeble resistance offered and the final unanimity with which the document framed by Jefferson and others in pursuance thereof was adopted. That it likewise met with public approval is evidenced by the support given to its principles by a majority of the people.

An analysis of the theory of government as declared in the Declaration of Independence is interesting and important in view of the many questions that subsequently arose. It is first declared, after certain introductory statements,

"That all men are created equal, that they are endowed by their Creator with certain unalienable rights, among which are life, liberty, and the pursuit of happiness." This idea, taken probably from John Locke and Rousseau, of whom we are told Jefferson was an ardent admirer, comparatively new at the time and not recognized as a theory subject to practical operation by any of the existing governments, was the assertion of a great Democratic principle which was subsequently to be interwoven into the government of the American Commonwealth. It placed the emphasis upon man as an individual and not upon the state. It denied to any man or set of men the right of legal or political privilege, advantage, or immunity. In the formation of the state and the establishment of law each had an equal voice, and before the law each stood upon a similar footing. But not only is there equality of right, there are certain rights which are "unalienable," such as life, liberty, and the pursuit of happiness. While at this time, when the principle is so widely recognized, the expression seems trite and commonplace, yet at a time when many of the ruling princes still claimed to govern by Divine right and all of them asserted themselves to be the reservoir of law and privilege, it had stronger significance. The pages of history are filled with violations of such rights too numerous to mention, many of which may be recalled upon slight reflection.

"To secure these rights," continues the Declaration, "governments are instituted among men,

deriving their just powers from the consent of the governed." In other words, all sovereignty resides in the people and not in the government or state, the ruling prince or officers. This principle, especially during the formative period of the Federal government, will be frequently reiterated and appealed to for the solution of many of the problems that will arise.

"That whenever any form of government," it is next asserted, "becomes destructive of these ends, it is the right of the people to alter or abolish it, and to institute a new government, laying its foundations on such principles and organizing its powers in such form as to them shall seem most likely to effect their safety and happiness." It is admitted that this is a power which should be exercised only under the most pressing necessity and only when oppression becomes imminent. In it, however, in later years was found justification for the doctrine of secession with all of its attending disaster, and its practical application to the colonies gave rise to serious difficulties and problems. What government would be destructive of the ends mentioned would of course be a matter of opinion, a thing about which statesmen would differ, and viewed from different standpoints would be a source of grave difficulty. This is later exemplified in the opposing views of the Federalists and Republicans, the former seeing redemption only in a strong centralized government, the latter seeing therein only disaster.

Proceeding thence out of a decent respect for the opinions of mankind to enumerate the grievances against the mother country it is as a result declared, "That these United Colonies are and of right ought to be free and independent states; that they are absolved from all allegiance to the British Crown, and that all political connection between them and the State of Great Britain is and ought to be totally dissolved."

Thus was independence declared and allegiance severed. But what was the status of the colonies? Were they thirteen independent states having all of the attributes of sovereignty, or were they, as is said by Von Holst in his Constitutional and Political History of the United States, "under the name which they had assumed of the United States of America jointly a sovereign state and a member of the family of nations, recognized by the law of nations"? What powers had the Congress and what the legislatures of the respective states? In international intercourse through whom should national powers be exercised? In whom did title to the vast unoccupied territory of the country vest? In what tribunals should national causes be vested? How should the national government and national undertakings be financed? How should national laws be executed? These and numerous other questions at once arose. The exigencies of the war then being waged required the Congress to assume

many powers. It raised armies and appointed the higher officers, fitted out a navy and conducted all operations on land and sea. It made treaties, sent and received ambassadors, emitted bills of credit, and performed many other functions of national government. As was later said by Justice Paterson: "It was the general, supreme, and controlling council of the nation; the center of union, the center of force, and the sun of the political system." "Its powers," however, "were revolutionary in their nature, arising out of events," and the Articles of Confederation was a first attempt to permanently adjust the relations between the states and the central organization. This compact, denominated "a Firm League of Friendship," was based upon the theory that all sovereignty resided in the states, and Congress could exercise only those powers expressly granted to it. The state and not the individual was the governmental unit. It vested in Congress practically the same powers it had been exercising without furnishing it the means of carrying them into effect. There was no source of revenue except that depending upon the will of the several states, they reserving the right to levy taxes even for paying national expenses. No executive was provided, nor was there any provision for a national judiciary. As a practical result the states remained dominant.

With the passage of the emergency of war, and even during the war, slight attention was paid

to the requisitions of Congress and there were no means of enforcing them. Matters grew from bad to worse. It became evident that if there was to be an efficient central government, its powers must be increased; there must be means for raising revenue; there must be a body having authority to make laws appropriate to national existence operative throughout the states, and, when made, there must be a department for enforcing them, for, to quote Bracton, "It would be superfluous to make laws, unless those laws, when made, were enforced." Not only so, but when laws are made and attempted to be enforced, occasion will arise "when their application will be doubtful or intricate," and a judicial department must also be established.

The adoption of the Constitution gave these increased rights, but the greater part of the old political and judicial problems remained and many new ones arose. Agitated just as strongly was the question as to whether or not the new government was a nation or a league of states. Where was the sovereign power? How should the provisions of the Constitution be construed; liberally for the purposes of accomplishing the ends of national government, or strictly and according to its letter? Could a state refuse to be bound by the obligations of the government and in case it saw fit withdraw from the Union? Could a state be sued? What rules of practice should guide the national judiciary in its proceedings? How should their judgments

be enforced? Other controversies equally as grave would be brought before the courts and there was little precedent to guide. Truly it may be said that an unusual task lay before the Supreme Court, which was looked to as the final arbiter of these vexed questions.

CHAPTER II

ORGANIZATION AND FIRST TERMS

Upon the assembling of the National Constitutional Convention one idea upon which there was complete unanimity was that there should be a Federal judiciary with at least limited jurisdiction in national affairs. With the development of the idea that a well-regulated government should consist of three co-ordinate departments, it was but natural that the determination of judicial matters should be vested in tribunals especially provided for that purpose. If the interpretation of the laws was to be kept separate and distinct from the making and executing of them, then logically a Federal judiciary must be created. The only matters which gave any considerable difficulty were the mode of appointing judges, their tenure of office, and the division of judicial authority among the different courts and their relation to each other. An especially delicate question was, What should be the relation of the national judiciary to that of the states?

The solution of these questions was largely a matter of experience and necessity. After independence of the colonies the idea became prevalent that the courts should be made more responsive to the people, and judges came to be generally elected by popular vote. The experience proved unsatisfactory; many unqualified men were placed in office, politics entered into the administration of justice, and that independence which is so essential to a proper determination of judicial matters was lost. As a result, the tendency, even before the convention met, was to a return to appointment for long terms or during good behavior. As to the distribution of authority the necessity of a Supreme Court was clearly apparent. Without it there could be no consistency in the administration of national affairs. It was equally as evident, too, that the one court could not handle all of the national issues that would arise. In the first place, there would not be time for the court nor could the judges endure the labor of passing on all the numerous causes that would occur in the administration of the Federal government. The convenience of suitors, witnesses, and officials pointed to the necessity of local tribunals with power to determine local matters. Hence the provision of the Constitution vesting the judicial power in one Supreme Court and such inferior courts as Congress may from time to time ordain and establish. With regard to the state courts the problem was solved by leaving them their

jurisdiction unimpaired with regard to intra-state matters and adding thereto the right to determine matters under the Federal law, subject to the right of removal in certain cases and an appeal to the Federal Supreme Court in others.

The development of the plan constitutes an interesting study. It was the Supreme Court that caused most fear among the citizenship of that time, which had an abhorrence of arbitrary power and was seeking to establish purely democratic institutions. If, said they, that court, a separate and independent body, have power to construe the laws, according to the spirit of the Constitution it will be superior to the legislature and can mold the laws into whatever shape it thinks proper. Hence an effort was made to have it connected with the senate and become an institution somewhat analogous to the highest court of Great Britain. This effort, however, was defeated by Hamilton and others, who insisted that the advantages to be derived from the separation lay in the very fact of the court being able to protect the Constitution; for, argued they, from a body partially interested in passing bad laws it could hardly be expected that it would show more moderation in interpreting them. On the other hand, the long tenure of the justices, their elevated position, and the resulting independence were the safest guarantee of the preservation of the national government as designed by its founders. The wisdom of these contentions is exemplified by the subsequent history of the Court.

It is generally thought that its real history begins with the appointment of John Marshall as its Chief Justice. A study, however, of its establishment, of its first members, and their early decisions is instructive and shows that the foundations were already being laid for its future greatness and influence, even before the appointment of the great Chief Justice. In fact, it may be said that its previous history made his career possible. It was necessary that the people should to some extent become accustomed to its existence, its procedure, and its claims of supremacy before it could in fact become supreme. This was true, notwithstanding the fact that the great majority of the Constitutional Convention intended to establish a court that should have ultimate control in the decision of national questions. Claims of state sovereignty and state rights presented and championed by men of almost unbounded influence and intellectual powers made the attainment of that end difficult and required a slow but steady growth. Opposition had, to some extent at least, to be reconciled. Time, with wisdom and moderation on the part of the court, could alone accomplish that purpose.

Upon the ratification of the Constitution and the election of a President and members of the Congress it was planned that the new government should begin operation on the fourth of March, 1789. On that date, however, there were not sufficient members of either house in New York, which was to be the seat of the

new government, to organize. Finally, by the thirtieth of March, thirty members of the lower house had arrived and it was opened for attention to such matters as should come before it. A week later the Senate was organized. Among the first acts of the Senate was the appointment of a committee consisting of Ellsworth, Paterson, McClay, Strong, Lee, Bassett, and Wingate to frame a bill for the establishment of a judiciary under the provisions of the Constitution. On September 24, 1789, this committee reported a bill which provided that the Supreme Court should consist of six justices, and, following the provisions of the Constitution, gave that court exclusive jurisdiction in all controversies of a civil nature where a state was a party, in suits or proceedings against ambassadors or other public ministers insofar as the law of nations permitted; and original, but not exclusive, jurisdiction in cases of aliens, or between a state and citizens of other states, in suits brought by ambassadors or other public ministers, or in suits to which a consul was a party. The Act also provided for the establishment of district courts in each state and for the appointment of a judge for each court and, dividing the then eleven states into three groups, provided a circuit court for each group to be composed of two justices of the Supreme Court and the judge of the district in which the court was held. Appeals were provided for from the last-mentioned courts and state courts of last resort to the Supreme Court. With regard to state courts,

judgments might be reviewed upon writs of error when the validity of a treaty, an act done or a right conferred by virtue of a treaty, or a law of the United States was questioned and the decision was against such treaty, act, or right, or the decision of a state court had affirmed the validity of a state law which might be contrary to the Constitution or a treaty made in pursuance thereof. The Supreme Court was also given the right to issue "writs of prohibition, mandamus, habeas corpus, certiorari, and all other writs not specially provided for by statute, which may be necessary for the exercise of its jurisdiction, and agreeable to the principles and usages of law."

The first meeting of the Supreme Court was held in temporary quarters in the Exchange Building in the city of New York on February the first, 1790. The Chief Justice was John Jay of New York, who stood so high in the estimation of President Washington that he was given his choice of any position in the gift of the Government. He was of Huguenot ancestry, was of a decidedly judicial temperament, believing in orderly and well-regulated liberty, was conservative but of considerable strength of character. He was a member of the New York Provincial Congress and is said to have drafted the constitution which his native state adopted at that time and retained until 1848 without material change, and under which he became Chief Justice. In 1779 he was elected by the legislature of the state of New York a

member of the Continental Congress and was in the same year elected its president to succeed Henry Laurens, who had resigned. He had also seen diplomatic service, having been appointed minister to Spain, from where he went to Paris in June, 1782, to join Franklin with a view of bringing the Revolutionary War to a close by the adoption of a satisfactory peace. The result of this mission is a matter of general history. On his return to New York on July 24, 1784, he found that Congress had elected him Secretary of Foreign Affairs, which position he held until his elevation to the Federal Bench. Add to this wide experience a broad and profound knowledge of the law, a strong and vigorous physique, a sober but pleasing personality, and it would seem that he was indeed well qualified to fill the position to which he was called. As future events show, however, his defect lay in his conservatism and his consequent unwillingness to take advantage of every opportunity under proper circumstances, as was especially needed at that time, to assert the power and authority of his court and hence develop its inchoate influence. His commission bore date September 26, 1789.

Next in seniority, his commission bearing date one day later, was William Cushing, the scholarly Attorney-General, Judge, and Chief Justice of Massachusetts. Prior to the Revolution he had been an ardent supporter of the cause of independence and upon the achievement of that victory he urged strongly the unit-

ing of the colonies. He was a strong believer in and defender of the Constitution and an effective, centralized national government. He was later to be offered the Chief Justiceship, which he declined. In addition to his legal learning he seems to have been a man of broad scholarship. His interest in letters and fine arts is evidenced by his being one of the founders of the Academy of Arts and Sciences.

Perhaps the greatest of them all was James Wilson of Pennsylvania, a Scotchman, of whom, in his "Constitutional History and Government of the United States," J. S. Landon, speaking of the Constitutional Convention, said: "He surpassed all others in his exact knowledge of the civil and common law, and the law of nations." He was also a profound student in the theory of government and left many speeches and writings on that subject. The foundation principle of his politics was that all sovereignty resided in the people and they could delegate it as they pleased. He was one of the signers of the Declaration of Independence, had seen service in the Colonial Legislature of Pennsylvania, the Continental Congress, the Constitutional Convention, and was one of the leading (if not the leading) advocates of the adoption of the Federal Constitution by the state of Pennsylvania. During and after the Revolution so great was the fame of his learning and so wide his reputation for integrity and good judgment that the King of France appointed him Advocate General for the French nation in the

United States. He, too, believed in a strong national government for the handling of national affairs. Long before Chief Justice Marshall had written his famous opinion in *McCullough vs. Maryland*, Wilson had written his "Considerations on the Power to Incorporate the Bank of North America" and had sustained the power even under the Confederacy by unanswerable logic. Yet he believed equally as earnestly in the proper preservation of the rights and powers of the states, his idea being the establishment of an "indestructible union composed of indestructible states." He was also the father of the Pennsylvania Law School, which claims the distinction of being among the first schools in the country devoted to the systematic teaching of law. His lectures, especially those on Blackstone, are of unusual interest.

The only other justice present at the opening session was John Blair of Virginia. As a lawyer and judge he was not far inferior, if so at all, to his associates. He was a graduate of William and Mary College and had studied law in England. For many years he had been Chief Justice of Virginia and judge of the High Court of Chancery of that state.

Edmund Randolph, who had been previously governor of Virginia and the proponent of the Virginia plan of union in the Constitutional Convention, was present as Federal Attorney-General.

The opening day was a notable event. The distinction of the personnel of the court, its

novelty, and the enthusiasm on the part of its friends for a propitious beginning, all served to make the occasion one of interest. There were present the judges of the Supreme Court of New York, the District Judge, the Mayor and Recorder of the City of New York, many distinguished lawyers, and numerous other citizens. The first business was the reading of the commissions of the justices and their qualification by taking the requisite oath. A crier and a clerk were appointed and a seal was adopted to consist of the Arms of the United States, engraved upon a piece of steel of the size of a dollar with the words in the margin, "The Seal of the Supreme Court of the United States." A rule for admission of attorneys and counselors to practice in the court was also adopted. It provided that they should have been such for three years past in the Supreme Court of the state of their residence. Of course, as was to be expected, there were no causes to be heard or disposed of. Hence the court adjourned *sine die* until the August term. In the evening "a very elegant entertainment" was given in honor of the court by the grand jury at Fraunce's Tavern.

When the court reconvened at the next term a new justice was in attendance, James Iredell of North Carolina. He was a native of England, of Irish descent, and had come to Edenton, N. C., in 1768, as a customs officer for the port of Roanoke in that state, representing the British Government. He studied law in the office of Samuel Johnson, a strong lawyer, author,

and politician. He had been deputy attorney-general, a councilor of state, and a district judge. In both of the conventions of the state of North Carolina called to consider the new constitution he was the leading advocate. It was said of him that "he was conspicuous for his graceful elocution, for the apt application of his varied learning, his intimate knowledge of the working schemes of government, and his manly and generous temper." He was not an orator as generally understood, but was a forceful and concise speaker. He and James Wilson thus coming together on the Supreme Court bench were to become fast friends, and in later years were both to return to Edenton, where they both died, the former in 1799, the latter in 1798.

Neither at the August term nor at the February term, 1791, was there any business before the court. At the following three terms only causes involving matters of practice were considered. In one case it was determined that writs of error to remove causes to the court could issue only from the office of the Clerk of the Supreme Court and in another that a commission to examine witnesses in a foreign country would not issue until the commissioners were named. It will be seen, however, that the court was beginning to outline its methods of procedure. That such a course was necessary cannot be questioned. Separate and apart from any question of state rights and an aversion to resorting to the Federal courts as a

result, it is not surprising that there was little work to be done. The whole matter was an uncharted realm. The idea of Federal courts having jurisdiction of national questions and being able to reach citizens of the several states by their process, and especially of a Supreme Court having authority to revise the decisions of the highest courts of the states was so novel that the full power and effect had not yet been comprehended to any large extent by suitors or their legal advisers. Even the court itself seems to have been slow in determining the rules for guidance in its practice, for it was not until the August term, 1792, when the Attorney-General, Mr. Randolph, moved for information, by which attorneys and counselors of the court should regulate themselves, that the Chief Justice stated that "the court considers the practice of Kings Bench and Chancery in England as affording outlines for practice in this court, and that they will, from time to time, make such alterations therein as circumstances may render necessary." This determination has been attributed solely to John Jay, the then Chief Justice, but it was more likely the idea of the entire court. It was the practice with which the members of the court and the Bar were most familiar, had years of growth and history behind it, all of which would make their appeal.

With the appointment and qualification of Thomas Johnson of Maryland, who took his seat at this term, the court for the first time

had its six members as provided by the original Act. Justice Johnson, besides being a great lawyer, had the unique distinction of having moved the appointment of General Washington as Commander-in-Chief of the Continental Armies. He was an ardent patriot, having served at the head of the Maryland militia for a part of the time during the Revolution. He was several times a member of the Provincial Congress of Maryland, was a member of the Continental Congress, and a member of the commission that laid out the city of Washington. He realized the fact that union of some kind was necessary to the best interests of the American colonies and hence when the Articles of Confederation were proposed he became an earnest advocate, and upon the failure of that experiment fought just as vigorously for the adoption of the Federal Constitution. As an evidence of his distinction in his day it is worthy of note that he was offered at one time the position of Chief Justice of the United States Supreme Court and at another that of Secretary of State, both of which honorable positions he declined. The work of the court, however, seems not to have appealed to him since he resigned about a year after his appointment.

It was at this term, too, that the first controversy of real importance came before the court. It is known as Hayburn's case, in which cause the court was called upon to declare the independence of the judiciary and to protect its

members from the imposition of onerous burdens by the legislative branch of the government. On the twenty-third of March, 1791, Congress had passed "An Act to Provide for the Settlement of Claims of Widows and Orphans Barred by the Limitations heretofore Established, and to Regulate Claims to Invalid Pensions," under the terms of which the circuit courts were required to investigate claims and list and classify such claimants. In extremely dignified, but positive, language the several courts protested against this action on the part of Congress. All of them refused to perform the service as justices, but some consented to act as commissioners. These protests are interesting and show that even at that early day, while the Congress may not have had a proper conception of the three fundamental divisions of the newly formed government, yet the judicial branch had grasped the idea. That of the Circuit Court of Pennsylvania, composed of Wilson, Blair, and Peters, may be taken as an example. In a letter jointly addressed to the President, they say:

"To you it officially belongs to 'take care that the laws' of the United States 'be faithfully executed.'

"Before you, therefore, we think it our duty to lay the sentiments, which, on a late painful occasion, governed us with regard to an act passed by the legislature of the Union.

"The people of the United States have vested in Congress all legislative powers granted in the Constitution.

“They have vested in one Supreme Court, and in such inferior courts as Congress shall establish ‘the judicial power of the United States.’

“It is worthy of remark, that in Congress the whole legislative power of the United States is not vested. An important part of that power was exercised by the people themselves, when they ‘ordained and established the Constitution.’

“This ‘Constitution is the supreme law of the land.’ This supreme law ‘all judicial officers of the United States are bound, by oath or affirmation, to support.’

“It is a principle important to freedom, that in government, the judicial should be distinct from, and independent of, the legislative department. To this important principle the people of the United States, in forming their Constitution, have manifested the highest regard.

“They have placed their judicial power not in Congress, but in courts. They have ordained that the ‘judges of those courts shall hold their offices during good behavior,’ and that during their continuance in office, their salaries shall not be diminished.

“Congress have lately passed an Act to regulate, among other things, ‘the claims to invalid pensions.’ Upon due consideration, we have been unanimously of the opinion, that, under this act, the circuit court held for the Pennsylvania district could not proceed: 1st, Because the business directed by the Act is not of a judicial nature. It forms no part of the power vested by the Constitution in the Courts of the United States; the Circuit Court must

consequently have proceeded without constitutional authority. 2d, Because, if, upon that business the court had proceeded, its judgments (for its opinions are its judgments) might, under the same Act, have been reviewed and controlled by the legislature and by an officer in the executive department. Such revision and control we deem radically inconsistent with the independence of that judicial power which is vested in the courts, and consequently with that important principle which is so strictly observed by the Constitution of the United States."

The protests of the other two circuit courts were equally as strong, and an important issue had arisen between the two departments of government. In order to bring the matter to a decision the Attorney-General moved the court for a mandamus "to be directed to the Circuit Court for the District of Pennsylvania, commanding the said court to proceed in a certain petition of William Hayburn, who had applied to be put on the pension list of the United States as an invalid pensioner." The motion was first made *ex officio* and was refused by the court on the ground that the Attorney-General had no such authority by virtue of his office. The motion was then made on behalf of Hayburn as an interested party and was argued at length. No decision was ever pronounced in the matter, however, as the court took the cause under advisement and before a conclusion was reached, another Act was passed

relieving the justices from the duties imposed by the previous Act. What the decision must have been, can scarcely be doubted. The several protests show all too plainly the attitude of the justices. In fact, each one had positively expressed his opinion and the petition must have been refused. The new Act of Congress was probably a result of the solemn declarations of the justices and judges who composed the circuit courts.

In these protests we see the sowing of the seed which were later to germinate and ripen into fruit in the great opinion in *Marbury against Madison*, when the court should stand forth as the defender of the Constitution and in express words assert its power to declare any Act of Congress in conflict therewith a nullity. That it was the proper season only for sowing the seed must be evident to even the casual student of history. There can be no doubt but that the members who composed the court had the courage to promptly declare the Act invalid. The majority of them had shown time and again that they had the energy, intellect, and spirit to express their opinions and stand up for their convictions. They were statesmen, however, as well as judges. They had lived through the troublous times of the Revolution, they had seen the effects of the jealousies and claims of sovereignty on the part of the several states during the Confederacy, and they had been participants in the institution of the new government and realized the fears that were felt in connection with it.

They knew that the latter institution was still in the experiment stage and that the foundations of the court were not firmly established. The wisdom, therefore, at that time of declaring such a power inherent in the court must have occurred to them, and even at this day and time we must admire their moderation and foresight in giving the Congress an opportunity to correct the grievance without the court having to assert its power, as it would have been bound in duty to do.

CHAPTER III

THE FIRST GREAT CONTROVERSY

If the issue in Hayburn's case, and the consequent storm which its decision may have precipitated, were avoided by the court through a short delay, it was not so fortunate in the case of Chisholm, as Executor, against the State of Georgia. This action in assumpsit, instituted at the August term, 1792, was a suit by a citizen of South Carolina upon an alleged claim of his testator against the State of Georgia. The state did not appear, although the Marshal for the District of Georgia made return that he had duly served the Governor and Attorney-General. This return bears date the eleventh day of July, 1792. Thereupon at the August term of the court for that year Mr. Randolph, the Attorney-General, who represented plaintiff as counsel, moved "that unless the State of Georgia shall, after reasonable previous notice of this motion, cause an appearance to be entered, in behalf of the said state, on the fourth day of the next

term, or shall then show cause to the contrary, judgment shall be entered against the said state, and a writ of enquiry of damages shall be awarded." The motion was continued for consideration at the February term, 1793, and its determination was the question before the court in the cause. The state did not appear, but through Messrs. Ingersoll and Dallas, prominent attorneys of the Philadelphia Bar, presented to the court a written remonstrance and protest against its exercise of jurisdiction. The general feeling on the subject of maintaining such a suit is indicated by the opening remarks of the Attorney-General. Said he: "I did not want the remonstrance of Georgia to satisfy me that the motion which I have made is unpopular. Before the remonstrance was read, I had learnt from the acts of another state, whose will must be always dear to me, that she too condemned it. On ordinary occasions, these dignified opinions might influence me greatly; but on this which brings into question a constitutional right, supported by my own conviction, to surrender it would in me be official perfidy." What the actual feeling among the masses of the people must have been it is impossible at this time to realize. The states had just brought to a close a long and bitter contest to rid themselves of the dominance and control of the British Government. The time was an era of democratic revolutions and the dawn of recognition of individual rights and privileges. The French Revolution, then at its height, was

having its effect throughout the civilized world, and despotism and aristocracy were being bitterly fought. Perhaps never before in the history of the world was the great mass of the people so alert to the preservation of the rights already attained or so eager to further promote those ends. In America the drift was already toward the establishment of parties, the line of cleavage being between those in favor of a strong centralized government and those favoring the retention of most powers in the states. The former, soon to call themselves Federalists, and representing generally the creditor and more or less aristocratic class were led by Washington, Hamilton, Jay, and others. The latter, to which belonged most of the debtor class, and as a rule those of average means and intelligence, were then or soon to be largely dominated by Thomas Jefferson. These became the Republicans. To these latter, the Federal Courts, and especially the Supreme Court, had always seemed merely a means for the final consolidation of the states into a nation little short of a monarchy, even if it did not go entirely to that limit. When, therefore, a state was cited to appear before that tribunal and judgment was threatened against it in case of default, popular feeling was increased and anger knew no bounds.

The suit grew out of certain land grants of the State of Georgia made in 1788 under which the state undertook to dispose of about twenty-five millions of acres of its western lands to

four land companies, among which was a South Carolina association. Payment was attempted to be made in South Carolina and Continental scrip, which the state refused to accept. The final purpose of the action was to require the state to comply with the grant.

Upon the call of the motion the court requested that it be argued under the following propositions: (1) Can the State of Georgia, being one of the United States of America, be made a party defendant, in any case, in the Supreme Court of the United States, at the suit of a private citizen; (2), If so, does the action of assumpsit lie; (3), Is the service of the Governor and the Attorney-General a sufficient service of the state; and (4), By what process ought the appearance of the State of Georgia to be enforced.

In answering the first question the Attorney-General contended that the express wording of the Constitution vested jurisdiction in the Supreme Court over the state as a defendant at the suit of a private citizen, the language being, "The judicial power shall extend to controversies between a state and citizens of another state." In such cases the Supreme Court was given original jurisdiction, which jurisdiction was also recognized by the Judicial Act. In his view there was no logic in restricting the words to causes where the state appeared as plaintiff. In the Constitution a number of acts are prohibited to the states. These he enumerates, and submits the proposition that should

the states disregard them, "are they then to enjoy the high privilege of acting thus eminently wrong, without control; or does a remedy exist?" The love of morality, says he, would lead us to wish that some check should be found, if the evil which flows from it be not too great for the good contemplated. This check he finds exists in the power given by the Constitution to sue a state.

But the power is derived not only from the express words of the Constitution, but from the relation in which the states stand to the Federal Government, and by the law of nations on the subject of suing sovereigns. Admitting the sovereignty of the states and adverting to conditions existing during the Confederacy he argued that the Constitution was a last attempt at self-preservation and produced a new order of things. It derived its origin immediately from the people; and the people individually are, under certain limitations, subject to the legislative, executive, and judicial authorities thereby established. The states are in fact assemblages of these individuals who are liable to process. The limitations of the Constitution necessarily take away some part of the state sovereignty, but the harmony resulting more than compensates the loss, for if a state should injure an individual of another state, the latter must protect him by remonstrance. If this be ineffectual, war ensues and the Federal Government would be necessarily involved, thus destroying peace and concord among the states,

two of the great ends of the Constitution. Referring to a number of the confederations which have existed throughout the course of history, he contends that they can throw little light upon the question, although in several instances mentioned it was a regular policy of the Union to permit suits of individuals against the state or principality. Considering all the good results which would follow such a course, the conclusion is drawn that it would be no degradation of the sovereignty of the states to submit to the Supreme Judiciary of the United States.

With regard to the second question it was contended that of all forms of action that of assumpsit was the most appropriate. It implied a promise or undertaking, which could be made by a state, since it was a moral person, being an assemblage of individuals, who are moral persons. As to the other questions, his view was that the service on the Attorney-General and the Governor was a sufficient service, and that the court might when occasion arose frame such process as was proper, that matter being in the breast of the court.

The argument was concluded on the fifth of February. It cannot be doubted that the court realized the magnitude of the issue before it. For the first time it was being called upon to determine its authority under the Constitution and the issue was not simply legal, but many political considerations were involved. No one can read the opinions of the several justices and not be impressed with the solemnity

with which they went about their duty, nor fail to realize the serious consideration given and deep learning and research expended on the cause. On the eighteenth of February, there being present Justices Iredell, Blair, Wilson, and Cushing, and the Chief Justice, each delivered his opinion in open court. Justice Iredell, being the junior associate present, as was the custom of the court, read his opinion first.

In proceeding to express his views he strips the question involved of all political aspects and regards it merely as a legal issue to be solved. The great case, as he expresses it, is the determination of the motion made by the Attorney-General, and that motion resolves itself into the simple issue as to whether or not an action of assumpsit will lie against a state. If it will, says he, it must be by virtue of the Constitution of the United States and of some law of Congress conformable thereto. Even though the power is covered by the grant to the judiciary in the Constitution, that is not sufficient, for Congress must provide the manner and method of its exercise. Analyzing the Constitution on the subject and the Judiciary Act of the Congress, the conclusion is reached that if the power exists it must be found in the grant of original but not exclusive jurisdiction in controversies between a state and citizens of other states.

Contending that the words "controversies of a civil nature" were used advisedly, the framers of the Constitution must have meant one of two things: "either, 1st, in the con-

veyance of that part of the judicial power which did not relate to the execution of the other authorities of the general government to refer to antecedent laws for the construction of the general words they use; or 2d, to enable Congress in all such cases to pass all such laws as they might deem necessary and proper to carry the purposes of this Constitution into effect, either absolutely at their discretion, or at least in cases where prior laws were deficient for such purposes, if any such deficiency existed." He declares the construction contended for by the Attorney-General, that the moment the Supreme Court is organized it may exercise all jurisdiction vested in it by the Constitution whether Congress has provided a jurisdiction or course of procedure, as unheard of and without foundation. His view is that Congress must create the court and the necessary result and intention to be derived from the Constitution is that it can exercise jurisdiction only in those cases where Congress has made provision, there being but one limit, that the Congress shall not exceed its authority as laid down in the Constitution, in which case it would be the duty of the court to declare any act to that effect utterly void. It is the duty of Congress to legislate, that of the court to judge, and the court has no more right to doubt Congress doing its duty than Congress should doubt the court performing that imposed upon it. The duty then being upon Congress to provide a method of procedure, and the court having no authority beyond the pro-

visions so made, he turns to the Judicial Act and finds that provision has been made for the issuance by the Federal Courts of writs of *scire facias*, *habeas corpus*, and all other writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdiction and agreeable to the principles and usages of law.

The legislature thus made it plain that it did not intend to leave the court free to choose at its own discretion the path to justice, and if the remedy afforded by such principles and usages be not sufficient, the court must wait until others are established by the same authority. Such principles or usages must be either: 1st, those of the particular laws of the state against which the suit is brought; or 2d, principles of law common to all the states. On the first class he does not deem it necessary to dwell, since it cannot be doubted that no one of the states permitted compulsory suit for the recovery of money against itself. Hence the only principles of law that would be regarded are those common to all the states, and which, so far as this case is concerned, must be derived from the common law of England. While such common law may have been changed to some extent in the various states, yet no alteration had been made which could affect the question here, for no part of that law could have any reference to the present cause but that which prescribes remedies against the Crown. He declared that the United States is sovereign

as to all powers surrendered by the states, yet the states must be sovereign as to the powers reserved. The power of the general government, either of a legislative or executive nature, or which particularly concerns treaties with foreign powers, do for the most part, if not wholly, affect individuals and not states. While the judicial power is commensurate with these, it goes further, and where certain parties are concerned, although the subject in controversy does not relate to any special objects of authority of the general government wherein the separate sovereignties of the states are blended in one common mass of supremacy, yet the general government has a judicial authority in regard to such subjects of controversy. Such authority must be regulated, however, by legislative action; and that can extend only so far as authorized by the Constitution. In this particular instance the authority extends only to the decision of controversies in which a state is a party and providing laws necessary for that purpose, which can only mean that the authority can be exercised only in a case in which a state can be made a party.

Asserting that Congress intended by the Act in question merely to transfer jurisdiction from the state courts to the Federal courts, and citing as proof thereof the concurrent jurisdiction of the Supreme Court, he reaches the conclusion that the court can exercise no authority in the present case consistently with the clear intention of the Act, but such as a proper state court

would have been at least competent to exercise at the time the Act was passed.

Finding then no new remedy, he sets out to examine the authorities to determine whether or not under the principles of the common law an action of the nature of that then before the court could be maintained against one of the states of the Union. He examines causes against the Crown and finds that they can proceed only upon what is called a petition of right. As to the law with regard to corporations, which are mere creatures of the king or Parliament, whose acts are always subject to revision by the courts of justice or other governmental authority, and which are entirely dependent upon the government creating them, none of which are attributes of a state, it can have no application. Since no other part of the common law can be pretended to apply to the cause, he reaches the conclusion that it cannot be maintained. Before closing, however, he again adverts to the Attorney-General's argument and asserts that the people of the United States had a right to form such union as they saw fit, and examples drawn from the law of nations could not affect the question. If upon a fair construction of the Constitution the power contended for exists, then it may be exercised; but if it does not, then ten thousand examples of similar powers would not warrant its assumption. Since there is no law of Congress, however, permitting the suit, it is not necessary to commit himself on the constitutional question.

Referring to the policy claimed to be embraced in the issue he asserts that it is not a matter for the court to consider, but his personal views are opposed to those of the Attorney-General. To him, nevertheless, it is a delicate topic. His closing words are: "I pray to God, that if the Attorney-General's doctrine as to the law be established by the judgment of this court, all the good he predicts from it may take place, and none of the evils with which, I have the concern to say, it appears to me to be pregnant."

The other four justices upheld the converse of the proposition, holding that the cause of action as brought could be maintained and putting the decision on the broader ground that the state could be sued. Justices Blair and Cushing in opinions very similar in reasoning, brush aside all questions of general law and find in the Constitution express language permitting such suit. To them the idea that the phrase "controversies between a state and citizens of another state" should be construed to give the court jurisdiction only in those causes where the state is plaintiff borders on absurdity. Following up the argument, "controversies between a state and foreign states, citizens or subjects" would leave the court to determine only those few suits in which a state was suing such "foreign state, citizen or subject" and thus open wide the gate for any one of the states involving the whole nation in war by its acts of injustice. As to the effect on the sovereignty of the states,

they had by the Constitution unquestionably permitted curtailment of their prerogatives in many particulars, and there would be no reason in saying that the maintaining of the present suit would have any deleterious effect thereon. On the contrary, if the court should refuse to take jurisdiction it would renounce a part of the authority conferred and to that extent fail of the duty imposed upon it by the Constitution.

The Chief Justice in an able opinion answers the following questions: 1st, In what sense is Georgia a sovereign state; 2d, Whether suability is compatible with such sovereignty; and 3d, Whether the Constitution authorizes such an action against her.

In answering the first question, he says: "It may be useful to turn our attention to the political situation we were in prior to the Revolution, and to the political rights which emerged from the Revolution." Starting with the proposition that formerly the entire country was a part of the dominions belonging to the Crown of Great Britain and that all lands were held by grants from the Crown, he traces the history of the people through their various experiences, showing that in every instance it was the people who acted as sovereigns after the Declaration of Independence and that it was they who, in exercising their own rights and their own proper sovereignty "and conscious of the plenitude of it, declared with becoming dignity, 'We the people of the United States do ordain and establish this Constitution.'"

He then points out the difference between such sovereignty and the feudal sovereignty exercised by the princes of Europe and passes to the second question; viz., whether suability is compatible with state sovereignty. Suability by whom? Not a subject, for in this country there are none; not an inferior, for all the citizens being, as to civil rights, perfectly equal, there is not, in that respect, one citizen inferior to another. It is agreed that one free citizen may sue another; the obvious dictates of justice and the purposes of society demand it. It is further agreed that one free citizen may sue any number on whom process can be conveniently executed. A state being merely a number of such citizens, in what does the incompatibility consist? If one can sue a hundred thousand free citizens as a city, why cannot he sue them in the aggregate in the name of the state which they compose? Or if one hundred thousand who compose a state can sue another state, why cannot one of the number sue such state? The questions answer themselves. He therefore reaches the conclusion that there is no incompatibility and, reciting the provisions of the Constitution, declares that that instrument gives the right to maintain the suit. The extension of the power granted is remedial and should be liberally construed. To him it is politic, wise, and good that the provision covering controversies between a state and citizens of another state should be construed to give the court jurisdiction because it is honest

and to construe it otherwise would contradict and do violence to the great and leading principles of a free and equal national government, one of the great objects of which is to insure justice to all.

The great opinion in the cause was delivered by Justice Wilson. Remarkable in its vision, clear in its logic and application of principles, elegant in its diction, and rich in its literary and legal allusions and learning, it irresistibly carries conviction. *W B*

The question for determination is stated in the opening paragraph as follows: "This is a case of uncommon magnitude. One of the parties to it is a state, certainly respectable, claiming to be sovereign. The question to be determined is, whether this state, so respectable, and whose claim soars so high, is amenable to the jurisdiction of the Supreme Court of the United States? This question, important in itself, will depend on others, more important still, and may, perhaps, be ultimately resolved into one, no less radical than this — 'Do the people of the United States form a nation?'" *Juror*

Stating that a cause so conspicuous and interesting should be carefully and accurately viewed from every angle, he lays down as the views from which he will examine it, the following: 1st, by the principles of general jurisprudence; 2d, by the laws and practice of particular states and kingdoms; and 3d, and chiefly, by the Constitution of the United States and the legitimate result of that valuable instrument.

As introductory to the first question he calls attention to the perverted sense in which certain terms in philosophy, metaphysics, and other sciences had grown to be used, and the evils resulting therefrom, and states that such use has never done mischief so pernicious as has been done by the improper use of the terms "states" and "sovereigns" in politics and jurisprudence — in politics and jurisprudence of those who wished and meant to be free. "For these terms," says he, "no substitutes will be used, but they will be used by me in a sense different from that in which they are almost universally accepted.

"In these purposes and in this application, I shall be justified by example the most splendid and by authority the most binding: the example of the most refined as well as the most free nation known to antiquity, and the authority of one of the best constitutions known to modern times. With regard to one of the terms — state — this authority is declared; with regard to the other — sovereign — the authority is implied only; but it is equally strong, for in an instrument well drawn as in a poem well composed, silence is sometimes most expressive.

"To the Constitution of the United States the term sovereign is totally unknown. There is but one place where it could have been used with propriety. But, even in that place it would not, perhaps, have comported with the delicacy of those who ordained and established

the Constitution. They might have announced themselves 'sovereign' people of the United States; but serenely conscious of the fact they avoided the ostentatious declaration."

Having thus expressed his disapproval of the ordinary use of the terms referred to, Justice Wilson proceeds to give the true application, saying, "I shall have occasion incidentally to evince how true it is that states and governments were made for man; and at the same time how true it is that his creatures and servants have first deceived, next vilified, and at last, oppressed their master and maker." According to this argument man, fearfully and wonderfully made, is the workmanship of his all-perfect creator, while a state is the inferior contrivance of man, and from his native dignity derives all of its acquired importance. Of all human contrivances the state is certainly most transcendently excellent. It is concerning this contrivance that Cicero says so sublimely: "Nothing which is exhibited upon our globe is more acceptable to that Divinity which governs the whole universe than those communities and assemblages of men which, lawfully associated, are denominated states." Man, however, is more important, and state rights should succumb to his advantage, just the reverse of the ordinary acceptance.

He therefore defines a state as "a complete body of free persons united together for their common benefit, to enjoy peaceably what is their own, and to do justice to others. It is

an artificial person. It has its affairs and interests; it has its rules; it has its rights; and it has its obligations. It may acquire property distinct from that of its members. It may incur debts to be discharged out of the public stock, not out of the private fortunes of individuals. It may be bound by contracts, and for damages arising from the breach of those contracts."

Such being the nature of a state, is there anything in this description of it which intimates, in the remotest manner, that a state, any more than the men who compose it, ought not to do justice and fill its engagements. Arguing from principles of justice, the analogy of a state to a group of individuals, and the relations which the individuals bear to the law, he reaches a negative conclusion. Says he: "A state, like a merchant, makes a contract; a dishonest state, like a dishonest merchant, wilfully refuses to discharge it; the latter is amenable to a court of justice. Upon general principles of right shall the former, when summoned to answer the fair demands of its creditor, be permitted, proteus-like, to assume a new appearance and to insult him and justice by declaring, 'I am a sovereign state'? Surely not. Before a claim so contrary, in its first appearance, to the general principles of right and equality be sustained by a just and impartial tribunal, the person, natural or artificial, entitled to make such claim should certainly be well known and authenticated. Who or what is a sovereignty? What

is his or its sovereignty? On this subject the errors and mazes are endless and inexplicable."

In one sense the term sovereign has for its correlative, subject. That sense can have no application to this country for there are no subjects, but all free men. In another sense it is applied to a state which is said to govern itself without dependence on any other power. This can have no application, for the government of the several states are republican, which is a government constructed upon the principle that the supreme power resides in the body of the people. Says he: "As a judge of this court, I know and can decide upon the knowledge that the citizens of Georgia, when they acted upon the large scale of the Union, as a part of 'the People of the United States,' did not surrender the supreme or sovereign power to that state, but as to the purposes of the Union, retained it to themselves." The third sense of the term as ordinarily used is that growing out of feudalism. This doctrine never having obtained in this country the idea of sovereignty growing out of that institution can have no application. Its principle was that all human law must be prescribed by a superior. The true doctrine, and that obtaining in this country, very different in its nature and operations, but the basis of sound and genuine jurisprudence, is that all laws derived from the pure source of equality and justice must be founded upon consent of those whose obedience they require.

The sovereign when traced to his source must be found in man.

Turning now to history, he examines the question by the laws and practice of the different states and kingdoms. In Greece, Spain, Sparta, Aragon, England, and Prussia he finds confirmation of his views, or, as he expresses it, nothing against but much in favor of the jurisdiction of the court against a state. He quotes Frederick of Prussia as follows: "Judges ought to know that the poorest peasant is a man as well as the king himself; all men ought to obtain justice, since in the estimation of justice all men are equal, whether the prince complain of a peasant, or a peasant complain of the prince." Commenting on the words he says: "In his courts of justice, that great man stood upon his native greatness, and disdained to mount upon the artificial stilts of sovereignty." So in England, he finds that while the remedy against the Crown is by petition of right, yet the process is compulsory, for, according to Bracton, while the king in his courts of justice enjoys many privileges, yet he does not deter the subject from contending with him freely.

But most important of all, what power has the court under the Constitution? Could the Constitution vest jurisdiction over a state and has it done so? Again commenting upon the ordinary idea of sovereignty and the emanation of all law from the prince, who thus comes to believe himself the source thereof, he contends that even in the United States we have

gone a step too far and place the emphasis on the states and the United States instead of on the people who compose them. Says he: "Is a toast asked? 'The United States' instead of 'The People of the United States' is the toast given. This is not politically correct. The toast is meant to present to view the first great object in the Union; it presents only the second: it presents only the artificial person, instead of the natural persons, who spoke it into existence. A state I cheerfully admit is the noblest work of man; but man himself, free and honest, is, I speak as to this world, the noblest work of God." If it once be admitted that the people formed the state, then it necessarily follows that they could change it in any particular they saw fit. Any or all of the former state powers they could extinguish or transfer to the Federal Government, and hence could transfer jurisdiction to the Federal courts over a state. Have they done so?

In reaching a conclusion on this proposition he first examines whether or not the people intended to bind the states by the legislative and executive power granted. Referring to the history of the Confederacy, the circumstances surrounding the establishment of the Constitution, and the Constitution itself, he answers in the affirmative, for says he, having reference to the legislative power granted, ever since the time of Bracton, his maxim, I believe, has been deemed a good one, that it would be superfluous to make laws, unless

those laws, when made, were to be enforced. He refutes the idea that the Constitution operates only on individuals and not on states. Then he reasons that if laws are to be made which shall operate against states, then it must have been the intention that they should be enforced by the executive department; and passing from the second to the third step, he declares that the necessary intention must have been that when those laws which were made and which were to be enforced were of doubtful application or intricate, it must have been the intention that the judicial department should construe them, thus giving the court jurisdiction. The same conclusion must be deduced from the declared objects and the general texture of the Constitution. Thus the expressed intentions to "form a more perfect union," "to establish justice," and to "insure domestic tranquility," all point unmistakably to the vesting of the court with judicial power over the states.

Finally he sums up his argument as follows: "Whoever considers, in combined and comprehensive view, the general texture of the Constitution, will be satisfied that the people of the United States intended to form themselves into a nation for national purposes. They instituted for such purposes a national government, complete in all its parts, with powers legislative, executive, and judiciary, and in all those powers extending over the whole nation. Is it congruous, that with regard to such purposes, any

man, or body of men, any person, natural or artificial, should be permitted to claim successfully an entire exemption from the jurisdiction of the national government? Would not such claims, crowned with success, be repugnant to our very existence as a nation? When so many trains of deduction coming from different quarters converge and unite at last in the same point, we may safely conclude, as the legitimate result of this Constitution, that the State of Georgia is amenable to the jurisdiction of this court."

Such being the view of the majority of the justices it was therefore ordered "that unless the said state shall either in due form appear, or show cause to the contrary in this court, by the first day of the next term, judgment by default shall be entered against the state."

The State of Georgia defied the court and its authority. An Act was introduced in and passed by its legislature to the effect that the Supreme Court had no power under the Constitution to force the State to appear or to answer legal process and further declared that any judgment entered by the said court would be disregarded. Suits were already begun against several of the other states and more were threatened. In this condition of affairs the Virginia legislature passed a resolution instructing her senators and representatives to unite their utmost and earliest exertions to secure a constitutional amendment to prevent a state from being sued in any of the

courts of the United States. This resolution the governor was instructed to send to all the other states. Massachusetts also protested against jurisdiction in the Federal courts in suits by a citizen of one state against another state. Especially were the leaders of the republican party stirred up over the turn of affairs and they urged vigorously the adoption of the amendment. As a result such amendment was proposed on December 2, 1793, and a sufficient number of states having approved, it was declared adopted January 8, 1798, the same being now the 11th amendment to the Constitution.

During the interval, however, at the February term, 1794, of the Supreme Court, judgment was entered for plaintiff in the Chisholm case and a writ of enquiry was awarded. No action was ever taken upon the writ, but the suit, as well as a number of others against other states, were still pending at the time of the adoption of the amendment. The serious question arose, therefore, as to whether or not the amendment could have a retrospective effect. This question was argued in 1798 in the case of *Hollingsworth vs. Virginia*, 3 Dallas 378, and it was unanimously held by the court that it applied to all cases past or future. Thus closed one of the most bitter legal controversies that ever took place in the country.

Although thus nullified by a constitutional amendment it cannot be doubted that even at that time the decision in the Chisholm case

was regarded as of unusual significance. The mere fact that it was so abrogated shows that the states and the people of the country generally were beginning to respect the decisions of the court and feel the impelling force of its sanctions. That its results were important and lasting, we quote no less authority than Judge Cooley, who said:

"After this clear and authoritative declaration of national supremacy, the power of a court to summon a state before it at the suit of an individual might be taken away by amendment of the Constitution — as was in fact done — without impairing the general symmetry of the Federal structure or inflicting upon it any irremediable injury. . . . The United States could scarcely have had a valuable existence had it been judicially determined that powers of sovereignty were exclusively in the states or in the people of the states severally . . . The doctrine of an indissoluble union, though not in terms declared, is nevertheless in its elements contained in the decision. The qualified sovereignty, national and state, the subordination of state to nation, the position of the citizen as at once a necessary component part of the Federal and state system, are all exhibited. It must necessarily follow that a nation, as a sovereign, is possessed of all those powers of independent action and self-protection which the successors of Jay subsequently demonstrated were by implication conferred upon it."

In other words, in determining the issues involved in the cause there were enunciated those great and fundamental principles upon which could be built a nation, while at the same time the integrity of the states, as well as private rights and privileges, were preserved. As a master builder, when about to erect a great edifice that shall stand through the ages, carefully removes the debris and sand and lays his foundation upon solid rock, so the court, having a vision of the future and realizing that they were building a nation which should be the home of generations yet unborn, a nation where justice should obtain and domestic tranquility be promoted, brushed aside all false ideas of sovereignty and state pride, and laid the foundations of that nation in the great principle that the whole people are the sovereign and all rights of government emanate from them. Once admit this principle as a proper guide for the interpretation of the Constitution it is capable of vast possibilities. Instead of the question being what provisions the people had power to put in the Constitution the question becomes one of what they intended to write therein. It is not a question of what rights and powers the national and state governments gave to the people, but rather what rights and powers the people gave them. And since the people gave the power, the necessary assumption must be that they intended it to be used for their advantage and intended to give all need-

ful and proper means and process for carrying such powers into effect. Such we conceive to be the idea upon which the doctrine of implied powers rests, the doctrine around which has grown up a large part of the authority now exercised by the national government. The cause may therefore be said to be the cornerstone of the national structure.

In a recent address Hon. Hampton L. Carson of the Pennsylvania Bar, after reviewing this cause with especial reference to the respective views presented by Justices Iredell and Wilson, says that the case established two schools of construction of the Constitution, the one the strict, the other the liberal. He says:

"I confess that I do not know where to find throughout the whole mass of judicial utterances since that August term, 1792, more impressive presentations of a fundamental question from opposite points of view than those of Wilson and Iredell. But when I consider that they are the first to be encountered in the books, and are the products of minds working without the assistance of prior adjudications, I regard them with admiration. Yet while in seeming opposition, they are not in antagonism. Nowhere does Iredell confute or attempt to challenge Wilson's majestic reasoning. Nowhere does Wilson pause to notice Iredell's contention that the powers of the Constitution relating to the judiciary can become effective only through an Act of Congress. The result has been, happily for ourselves, that both doctrines have stood.

Wilson's theory and its propulsive force have supplied the necessary stimulus and energy to Congressional action. Iredell's protest against spontaneous constitutional self-enforcement has protected us against excessive or capricious exercises of judicial power. Wilson's opinion is in itself a constitutional dynamo; Iredell's a constitutional regulator, without which the engine would have thrashed itself to pieces."

CHAPTER IV

GROWTH IN POWER AND INFLUENCE OF THE COURT

Conservatism has ever been one of the chief characteristics of the judicial department of the government, and especially has this been the case when it was called upon to construe certain phases of the Constitution. Even in the early days of the Supreme Court that attitude was apparent, and during the course of its history it has at times been so evident as to bring upon the Bench and Bar violent criticism and condemnation. Especially has this been true in times of political, social, and economic unrest, when the legislative department has been unwittingly carried along by waves of temporary public opinion, a public opinion often formed or augmented by passion and prejudice, and frequently fanned into flame by the demagogue. Examples are more or less frequent. In recent times it has been exemplified in the attitude

of the court to the referendum, the recall of judges, and numerous attempts by statute to bring about social, industrial, and political reform. Many of these latter attempts being meritorious have been sustained by the courts, while many others being unwise and unlawful to such an extent as to amount to an invasion of legal right have been condemned. Again, immediately following the Civil War, when sectional hatred was intense, and the legislative and executive departments seemed to be directed and controlled largely by animosity in dealing with the conquered states, it was the court, which by the conservatism, wisdom, and impartiality of judgment of its justices as exhibited in such cases as *Texas vs. White*, and the Slaughter House cases, that finally restored the Union to its proper status.

Many other interesting instances might be given, but we call attention to only one other, and that with a view of demonstrating the importance of some of the early decisions of the court that will be considered. In 1807 Aaron Burr, perhaps the most romantic character of American history, who had been vice-president and came near being president of the United States, was charged with instigation of a conspiracy which had for its purpose the overthrow of the government. The country was stirred to its depths. General Wilkinson, the commander-in-chief of the American armies, and now said by many authorities to have been a paid representative of both the Spanish and

English governments, was his chief accuser. Several communications by letter had passed between Burr and Wilkinson and there seems to be little doubt but that they were co-operating together in the schemes which Burr had planned when Wilkinson, seeing that the West could not be drawn away from the Union and that the schemes were to end in failure, attempted to turn the matter to his own advantage by exposing his confederates and pretending unusual zeal in blotting out the conspiracy. With this purpose in view he had a number of more or less influential persons arrested in the West and transported to the District of Columbia, where they were committed to prison on charges of treason against the United States by the Circuit Court for that district. Dr. Erick Bollman and Samuel Swartout, two of the persons so arrested, employed attorneys and moved the Supreme Court for a writ of habeas corpus. Conditions were unusual. The executive and legislative departments were overwhelmingly Republican, while the court was largely Federal, and a consistent effort was on foot by the former to as far as possible restrict the rights of the latter and bring it into public disrepute. Public opinion, formed largely from the proclamation of President Jefferson declaring that he had in his possession proof of the conspiracy, demanded punishment for the petitioners. On the call of the motion the contention was made that the Supreme Court had no jurisdiction in the matter, the defendants

having been committed by a court having concurrent jurisdiction in the premises. Fortunately for the defendants, and for the court too, as to that matter, Chief Justice Marshall in determining the issue was enabled to go back to the early days of the court when there was no party bitterness and find in the case of the United States against Hamilton, 3 Dallas 17, precedent for such jurisdiction and in the words of Harper, counsel for Dr. Bollman, was enabled to take refuge behind the wise and salutary maxim of *stare decisis*, as a court loves to do "in times and circumstances that might induce them to doubt of themselves, to dread the secret operations of their own passions and prejudices, or those external influences against which, in the imperfection of our nature, our minds can never be sufficiently guarded," and to declare that "from that decision the court would not lightly depart," and following which the defendants were given their liberty.

If in the Chisholm case principles of nationality were announced and maintained, so in the case of Hamilton the court's power to preserve individual liberty was likewise upheld. But this was not all. In the case of the United States against Judge Lawrence, 3 Dallas 42, the right of the inferior Federal courts to determine causes coming before them according to their best legal judgment was declared to be uncontrollable by mandamus issuing from the Supreme Court, a salutary doctrine in the administration of judicial matters coming before

those courts. In *Hylton against the United States*, 3 Dallas 171, the power of the Federal government to levy and collect taxes, direct and indirect, was considered and declared; and in *Calder against Bull*, 3 Dallas 386, and *Cooper against Telfair*, 4 Dallas 14, the powers of the states to pass laws and the control of the national judiciary over them was reviewed. Because of their importance the last three mentioned causes deserve special attention.

During the Revolution and under the Articles of Confederation the most serious drawback to the accomplishment of any national end was the inability of the central government to finance itself. Time and time again it seemed that the cause of independence must fail because the army could not be paid nor provisions and arms secured for it. Even after the treaty of peace was signed, the country was on the verge of anarchy because of the financial inefficiency of the Confederate government. It was without power at home or respect abroad. Its requisitions upon the states, the only method it had of raising revenue, were largely disregarded, thus leaving it without the means of raising, equipping, and maintaining an army or establishing a navy or doing any other acts which were necessary to the preservation of its national existence. Such was the condition of affairs when the Constitutional Convention met at Philadelphia. In that assemblage, perhaps no question, except that of representation, caused so much controversy as that of taxation.

Finally, however, a provision was agreed upon that Congress should have power to lay and collect taxes, duties, imposts, and excises, with the limitation, however, that all direct taxes should be apportioned among the several states according to population and that all duties, imposts, and excises should be uniform throughout the United States. In pursuance of this provision of the Constitution, Congress in June, 1794, passed "An Act to lay Duties upon Carriages, for the Conveyance of Persons." The plaintiff in error, Hylton, who claimed to keep one hundred and twenty-five carriages for his private use, refused to pay the tax upon the ground that it was a direct tax and should have been apportioned, whereas it was laid according to the rule of uniformity. The decision below being against him, the matter came before the Supreme Court upon a writ of error. In answering plaintiff's contention the court say: "It was, however, obviously the intention of the framers of the Constitution that Congress should possess full power over every species of taxable property, except exports. The term "taxes" is generical, and was made use of to vest in Congress plenary authority in all cases of taxation." That the term "tax" is the genus and includes (1) direct taxes, (2) duties, imposts, and excises, and (3) all other classes of an indirect kind and not within any of the classifications enumerated under the preceding heads. The opinion is expressed that probably the only direct taxes contemplated by the framers of

the Constitution were a capitation tax and a tax on land, although the court does not commit itself on this proposition. These alone are required to be apportioned. Those in the second class must be laid according to the rule of uniformity and those in the third as Congress may determine, there being no direction as to these. After reviewing the inequalities that would result from an attempt to apportion the tax on carriages and discussing generally the difficulties to be met with on the part of the National Government in attempting to collect any direct tax, especially as it would be necessary to resort to intricate and endless valuations and assessments in which everything would be arbitrary and nothing certain, Justice Paterson, who wrote what would probably be regarded as the superior opinion in the case, continues: "The rule of uniformity, on the contrary, implies certainty and leaves nothing to the will and pleasure of the assessor. In such cases, the object and the sum coincide, the rule and the thing unite, and of course there can be no imposition. The truth is that the articles taxed in one state should be taxed in another; in this way the spirit of jealousy is appeased, and tranquility preserved; in this way the pressure on industry will be equal in the several states, and the relation between the several subjects of taxation duly preserved. Apportionment is an operation on states, and involves valuation and assessments, which are arbitrary, and should not be resorted to but in case of necessity.

Uniformity is an instant operation on individuals, without the intervention of assessments, or any regard to states, and is at once easy, certain, and efficacious. All taxes on expenses or consumption are indirect taxes. A tax on carriages is of this kind, and of course not a direct tax." The same conclusion was reached by all of the justices taking part in the decision of the cause, and hence the Act was upheld.

The importance of this adjudication can hardly be overestimated. It opened up to the new government a simple and direct means of self-support, which even to the present day has been consistently used to meet its ordinary expenses. The great system of internal revenue has been built up and billions of dollars pass into the United States Treasury largely without the people being aware that they are sharing the burden. Time and again it has been cited as authority on the part of Congress to levy and collect taxes. Its language is so clear and the meaning so apparent that it was not until comparatively recent times that the court in passing upon an income tax law in *Pollock* against *Farmers Loan and Trust Company* found it necessary to explain or construe its purport.

The case is interesting, also, as the court was asked to condemn an Act of Congress and it contains an intimation that the court had the power to do so but that it would be exercised only in a clear case of conflict. Since this

principle, however, is more clearly announced in the cases of *Calder against Bull*, and *Cooper against Telfair*, we pass to a consideration of them.

The question before the court in the *Calder* case was the legality of an Act of the Connecticut legislature granting a new trial by the probate court in a cause involving the probate of a will. The will by regular proceedings had been refused probate and the time for appealing had expired. Had this status remained, *Calder* and his wife would have taken the property involved. On the new trial in pursuance of the Act, however, the will was sustained and on appeal to the highest court of Connecticut this finding was upheld. As a result the property devised vested in *Bull* and wife. The cause was brought into the Federal Supreme Court, where it was claimed that the Act in question violated the provision of the Federal Constitution prohibiting a state from passing an *ex post facto* law. It appeared from the record that the legislature of Connecticut had from the earliest times exercised authority when it deemed proper to revise judicial decisions, and as there was nothing in the state constitution prohibiting such action several of the justices expressed the view that the Act could be sustained on that ground. However, they all considered it from the standpoint of a legislative Act and upheld it upon the ground that the term *ex post facto* law had a technical mean-

ing and as used in the Federal Constitution referred only to criminal and penal matters.

The cause is interesting from the several expressions of the justices as to the power of the Supreme Court to declare an Act of Congress or of a state legislature invalid and the discussions of the relation of the states to the Federal Government. Thus, in the course of his opinion, Justice Chase uses the following language: "It appears to me a self-evident proposition that the several state legislatures retain all of the powers of legislation delegated to them by the state constitutions, which are not expressly taken away by the Constitution of the United States. The establishing courts of justice, the appointment of judges, and making regulations for the administration of justice within each state, according to its laws on all subjects not entrusted to the Federal Government, appears to me to be the peculiar and exclusive province and duty of the state legislatures. All the powers delegated by the people of the United States to the Federal Government are defined, and no constructive powers can be exercised by it, and all the powers that remain in the state governments are indefinite, except only in the constitution of Massachusetts." Again he says: "I cannot subscribe to the omnipotence of a state legislature, or that it is absolutely and without control, although its authority should not be expressly restrained by the constitution, or fundamental law of the state. The people of the

United States erected their constitutions or forms of government to establish justice, to promote the general welfare, to secure the blessings of liberty, and to protect their persons and property from violence. The purpose for which men enter into society will determine the nature and terms of the social compact; and as they are the foundation of legislative power, they will decide what are the proper objects of it; the nature and ends of legislative power will limit the exercise of it. This fundamental principle flows from the very nature of our free republican governments, that no man shall be compelled to do what the laws do not require; nor to refrain from acts which the laws permit. There are acts which the Federal or state legislatures cannot do without exceeding their authority. . . . Without giving an opinion at this time whether this court has jurisdiction to decide that any law made by Congress contrary to the Constitution of the United States is void, I am fully satisfied that this court has no jurisdiction to determine that any law of any state legislature, contrary to the constitution of such state, is void." Closing his opinion he says: "I am under a necessity to give a construction, or explanation of the words '*ex post facto* laws' because they have not any certain meaning attached to them. But I will not go further than I feel myself bound to do; and if I ever exercise the jurisdiction I will not decide any law to be void but in a very clear case."

Justice Iredell, taking a contrary view from that expressed by Justice Chase as to the power of the legislature when not controlled or limited by a constitution or some fundamental law, and asserting that it may pass any Acts it may see fit and the court could not interfere, says: "In order, therefore, to guard against so great an evil, it has been the policy of all the American states, which have individually framed their state constitutions since the Revolution, and of the people of the United States, when they framed the Federal Constitution, to define with precision the objects of the legislative power, and to restrain its exercise within marked and settled boundaries. If any Act of Congress, or of the legislature of a state, violates those constitutional provisions, it is unquestionably void; though, I admit, that as the authority to declare it void is of a delicate and awful nature, the court will never resort to that authority but in a clear and urgent case."

So in the case of *Cooper vs. Telfair*, where the plaintiff in error sought to have the court declare an Act of the Legislature of the State of Georgia, under which certain of his property was forfeited because of his course of conduct during the Revolution, declared invalid on the ground that it was in conflict with the Federal Constitution, the court denied the contention especially in view of the fact that the Act in question was passed previous to the formation of the Federal Constitution. In that case Justice Chase uses this language: "There is

likewise a material difference between laws passed by the individual states during the Revolution and laws passed subsequent to the organization of the Federal Constitution. Few of the Revolutionary Acts would stand the rigorous tests now applied; and although it is alleged that all Acts of the Legislature in direct opposition to the Constitution would be void, yet it still remains a question where the power resides to declare it void. It is indeed a general opinion, it is expressly admitted by all at this Bar, and some of the judges have individually in the Circuits decided that the Supreme Court can declare an Act of Congress to be unconstitutional, and therefore invalid, but there is no adjudication of the Supreme Court itself upon this point. I concur, however, in the general sentiment, with reference to the period when the existing Constitution came into operation." Justice Cushing said: "Although I am of the opinion that this court has the same power that a court of the state of Georgia would possess to declare the law void, I do not think the occasion would warrant the exercise of the power."

In view of these oft-repeated declarations, and in further view of the fact that the Supreme Courts of several of the states, among them those of South Carolina, Virginia, Vermont, and New Jersey, had exercised authority to declare legislative Acts invalid because in conflict with the constitution or fundamental law of such states, the decisions of the Supreme

Court in Marbury against Madison and Fletcher against Peck do not seem novel. In fact the importance usually attributed to these cases must be found in their masterful logic and the clear statement by which old propositions were maintained and the opportune exercise of authority under them. The principles themselves did not originate in the mind of the writer of those opinions. The fact, too, that such grave questions were being freely discussed and opinions fearlessly expressed as to the power of the court in connection with them shows what great progress the court had made in authority and influence during the few years of its existence.

CHAPTER V

PRESERVATION OF NATIONAL HONOR

An especial interest attaches to the case of Ware against Jones, since it was in that case that John Marshall made his first appearance in the Supreme Court. He represented the American debtors, and it is said that the forcefulness of his argument in their behalf brought him into recognition as one of the leaders of the Bar. The argument is interesting as showing some of the views on constitutional law held by him. In closing the last chapter it was stated that the principles announced in Marbury against Madison and Fletcher against Peck did not originate in the mind of Marshall. In the Ware case he contended: "The legislative authority of any country can only be restrained by its own municipal constitution. This is a principle that springs from the very nature of society; and the judicial authority can have no right to question the validity of

✓ a law, unless such jurisdiction is *expressly* given by the constitution." While it may not be entirely fair to attempt to arrive at a lawyer's real opinion on a legal question from an argument in a litigated case, yet one cannot help but note the change of view seven years later, when in the Marbury case, as a judge deciding that cause, he says: "So if a law be in opposition to the constitution, if both the law and the constitution apply to a particular case, so that the court must either decide that case conformable to the law, disregarding the constitution, or conformably to the constitution, disregarding the law, the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty." There are but few intelligent courts or lawyers of the present day who will not concur in the latter view, yet none would scarcely have the temerity to contend that such power is expressly given to the Supreme Court by the Constitution of the United States. It is necessarily implied, but not expressly given.

The case is interesting, however, not only from the fact of its being argued by the future Chief Justice, but because of the importance of the issues involved. The action was brought for a debt contracted by a resident of Virginia with a subject of Great Britain on the seventh of July, 1774. It was still outstanding at the commencement of the Revolution, during which war the State of Virginia had passed an Act sequestering all such debts and permitting the debtor

to pay the same into the state treasury. In the Treaty of Peace of 1783 it was provided "that creditors, on either side, shall meet with no lawful impediment to the recovery of the full value, in sterling money, of all bona fide debts heretofore contracted." Thereafter plaintiff's intestate instituted a suit in the Circuit Court for the District of Virginia to recover the amount of the debt, but he having died pending the litigation, his administrator was substituted. Defendant among other defenses plead payment by having taken advantage of the Act of Virginia under the provisions of which he had paid the greater part of the debt into the state treasury. Plaintiff replied, setting up the provisions of the treaty. The judgment in the Circuit Court was practically in favor of the defendant, that court having sustained a demurrer to the plea of the plaintiff, setting up the treaty. The question was therefore removed to the Supreme Court.

Justice Iredell was one of the judges sitting on the Circuit at the hearing, and from his opinion, which was read along with those of the other justices when the cause was determined in the Supreme Court, we can get some idea of the interest which it excited and the ability with which it was argued. Thus he says: "The uncommon magnitude of the subject, its novelty, the high expectation it has excited, and the consequences with which a decision may be attended, have all impressed me with their fullest force. I have trembled lest by an ill-

formed or precipitate opinion of mine, either the honor, the interest, or the safety of the United States should suffer or be endangered on the one hand, or the just rights and proper security of any individual on the other. In endeavoring to form the opinion I shall now deliver, I am sure the great object of my heart has been to discover the true principles upon which a decision ought to be given, unbiased by any other consideration than the most sacred regard to justice. Happy should I have thought myself if I could as confidently have relied on a strength of abilities equal to the greatness of the occasion.

"The cause has been spoken, too, at the Bar with a degree of ability equal to any occasion. However painfully I may at any time reflect upon the inadequacy of my own talents, I shall, as long as I live, remember with pleasure and respect the arguments which I have heard on this case. They have discovered an ingenuity, a depth of investigation, and a power of reasoning equal to anything I have ever witnessed, and some of them have been adorned with a splendor of eloquence surpassing what I have ever felt before. Fatigue has given away under its influence; the heart has been warmed, while the understanding has been instructed."

The cause was argued by E. Tilghman, Wilcocks, and Lewis for plaintiff in error and by Marshall and Campbell, both of Virginia, for defendant. In a strong opinion Judge Iredell established the authority of Virginia to pass

a Sequestration or Confiscation law, and such authority being established, he reaches the conclusion that it could not have been the intention of the peace commissioners to nullify acts done in pursurance of that law, thus depriving those parties who had taken advantage of the law of their property without compensation. Requiring the debt to be paid twice, although the commissioners might have had the power so to do for the public good, would amount to a breach of the public faith, and a construction which would have such result should not be adopted in the absence of dire necessity. In the cause before him he found no such necessity, since there were other classes of debts upon which the provision of the treaty would have operation, and therefore decided in favor of the defendants.

In this case, as in the Chisholm case, his views did not coincide with those of the other members of the court and the decision of the Circuit Court was reversed. Such disagreement, however, extended only to the effect of the treaty. On the question of the right of confiscation we quote Justice Chase, whose views were those of the court (except perhaps Justice Wilson who did not in a decided manner express himself), as follows: "I am of the opinion that the exclusive right of confiscation, during the war, of all and every species of British property within the territorial limits of Virginia resided only in the legislature of that commonwealth. . . . It is worthy of remembrance that delegates and representatives were elected by the people

of the several counties and corporations of Virginia, to meet in general convention for the purpose of framing a new government, by the authority of the people only; and that the said convention met on the sixth day of May, and continued in session until the fifth day of July, 1776, and in virtue of their delegated power, established a constitution, or form of government, to regulate and determine by whom and in what manner the authority of the people of Virginia was thereafter to be executed. As the people of that country were the genuine source and fountain of all power that could be rightfully exercised within its limits, they had therefore an unquestionable right to grant it to whom they pleased, and under what restrictions or limitations they thought proper. The people of Virginia by their constitution or fundamental law, granted and delegated all their supreme civil power to a legislature, an executive, and a judiciary; the first to make, the second to execute, and the last to declare or expound the laws of the Commonwealth. This abolition of the old government and this establishment of a new one was the highest act of power that any people can exercise. From the moment the people of Virginia exercised this power, all dependence on and connection with Great Britain absolutely and forever ceased; and no formal declaration of independence was necessary, although a decent respect for the opinions of mankind required a declaration of the causes which impelled the

separation." Virginia, then being sovereign, had a right to confiscate the property of her enemy according to the practice of the law of nations, and by the Act in question she intended such confiscation.

But being a sovereign, Virginia had a right to make peace herself or to delegate that power to the Congress of the Confederacy. She chose the latter course and by the 9th Article of the Confederation she agreed "that the United States, in Congress assembled, shall have the sole and exclusive right and power of determining on war and peace. . . ." Answering Marshall's doubt as to whether Congress had power to make a treaty that could operate to annul a legislative Act of any of the states, and to destroy rights acquired by or vested in individuals, it is said a few remarks will show that the contention cannot be sustained. (1st) The legislatures of all the states have often exercised the power of taking the property of its citizens for the use of the public, but they uniformly compensated the proprietors. (2d) The legislatures of all the states have often exercised the power of divesting rights vested; and even of impairing, and, in some instances, of almost annihilating the obligation of contracts, as by tender laws, etc.; and (3d) If the legislature of Virginia could, by a law, annul any former law, as it is contended she has the right to do, the effect would be to destroy all rights acquired under the law so nullified. If she can do this by an Act of her legislature,

then, being sovereign, she could do the same by treaty. The treaty-making power, however, having been given to Congress, it has a like power.

"If doubts could exist before the establishment of the present national government," says Justice Chase, "they must be entirely removed by the 6th Article of the Constitution, which provides 'That all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding.' There can be no limitation on the people of the United States. By their authority the state constitutions were made, and by their authority the Constitution of the United States was established; and they had the power to change or abolish the state constitutions, or to make them yield to the General Government, and to treaties made by their authority. A treaty cannot be the supreme law of the land, that is, of all the United States, if any Act of a state legislature can stand in its way. If the constitution of a state (which is the fundamental law of the state and paramount to its legislature) must give way to a treaty, and fall before it, can it be questioned whether the less power, an Act of the state legislature, must not be prostrate? It is declared the will of the people of the United States that every treaty made by the authority of the United States

shall be superior to the constitution and laws of any individual state; and their will alone is to decide. If a law of a state, contrary to a treaty, is not void, but voidable only by a repeal or nullification by a state legislature, this certain consequence follows: that the will of a small part of the United States may control or defeat the will of the whole. The American people have been pleased to declare that all treaties made before the establishment of the National Constitution, or laws of any of the states contrary to a treaty, shall be disregarded.

Proceeding then to determine the principal objects which both sides had in view in arriving at an agreement in 1783, the court reaches the conclusion that it must be clear from the plain and explicit words used in the 4th Article that it was the intention of the American Commissioners, which intention was duly approved by the Confederate Congress, to waive any claims under the Confiscation Acts of the several states in order that the greater objects might be attained; that in the present case, as well as in all other cases resulting in hardship from proceeding under the Confiscation Acts, the state government might be relied upon to make proper compensation to the individual for damages which he suffered for the common good. The cause was therefore reversed and judgment given for the plaintiff.

Thus was the national faith preserved and the treaty-making power of the National Government maintained. The cause stands out as

one of the great declarations of right and of fundamental principles which have been announced from time to time by that august tribunal; and however much the result must have dissatisfied debtors at the time, its justice will not now be questioned. That it did cause great dissatisfaction is evident from the then existing conditions. The settlement of the class of debts, which were many and in the aggregate amounted to a huge sum, involved in the litigation was one of the most serious problems that confronted the country during its early history. The people's finances, as well as those of the country generally, were in an unsettled condition, due to an almost unlimited issue of paper money by both the states and the Confederate Government, and the possibility of foreign creditors going into the national courts and enforcing the payment of debts in specie meant financial ruin for many of the debtors. In addition to this, there were a number of great statesmen, as, for instance, Jefferson, Henry, Madison, and others, who conscientiously believed that these obligations had been confiscated by the several states and to permit them to be collected would amount to a breach of the public faith. To permit, too, these Acts to be nullified by the national courts would result in an impairment of state sovereignty. Thus self-interest on the part of the debtors and political views on the part of many influential statesmen of the time militated against the adoption of the Constitution

and were largely responsible for the unpopularity of the Federal courts after its adoption.

Fortunately for the country, however, there was sufficient influence to overrule the opposition to the adoption of that great instrument and to call to the Federal bench men of sufficient vision to see the vast possibilities of a nation of properly united states. If the nation would be great and demand the respect of the other nations of the world, it must in good faith live up to the spirit as well as the letter of its treaties. This was the view of the court as to the treaty in question, for, as was so eloquently said by Justice Iredell: "If ever any people on account of the importance of a treaty were under additional obligations to observe it, the people of the United States surely are to observe the treaty in question. It gave peace to our country after a war attended with many calamities and, in some of its periods, presenting a most melancholy prospect. It insured, so far as peace could insure them, the freest forms of government and the greatest share of individual liberty, of which, perhaps, the world had seen an example. It presented boundless views of future happiness and greatness, which almost overpower the imagination, and which, I trust, will not be altogether unrealized. The means are in our power; wisdom and virtue are alone required to avail ourselves of them."

The possibilities thus perceived have not been unrealized. America stands to-day at the head of the nations and is especially noted for her

good faith in keeping her treaties and national compacts. The principles announced in Ware against Hylton have served as an unerring guide in her national transactions and have prevented interference on the part of the states. Its authority has never been questioned. On the contrary the case has been cited many times by both courts and text writers as sustaining the treaty-making powers of the national government and the supremacy of them when made.

CHAPTER VI

LAYING THE FOUNDATION OF AMERICAN INTERNATIONAL LAW

Closely akin to the issues involved in the Ware case, especially insofar as that case considered international rights of sovereigns, are the matters involved in the questions reviewed in this chapter.

With the growth of civilization and international relations, the respective rights, duties, and liabilities of the several nations among themselves as nations have opened up a wide field for investigation and study. Especially has the recent World War evidenced to students of this subject that these problems are far from settled. In fact, not since Grotius wrote his immortal book on the subject, in which he lays down the fundamental principles which should guide a nation in its intercourse in war and peace, have all these matters seemed to be more unsettled. With the advent of the sub-

marine, air craft, poison gas, and numerous other deadly instruments of warfare, and the close and interwoven relations in which combatant and noncombatant forces of a nation stand to each other, new problems have arisen which only the most serious thought and honest effort on the part of the statesmen of the nations can solve.

However serious the question to-day as a world question may be, it is not more serious than the conditions which faced the new nation at the time of which we are writing. Prior to and during the American Revolution a considerable merchant marine had been established by the American colonies and a large profit inured from carrying freight and trading with the mother country, the West Indies, and other English possessions. With independence, under the established rules and national policies as they existed at that time which permitted a nation to prohibit trade with its colonies, this trade and intercourse and its resultant revenue were stopped. In addition, England, then being at war with France and Spain, insisted upon the right to search American vessels for contraband and to impress into the service of her navy members of the crews whom she claimed to be Englishmen. To so great an extent was the practice carried that hundreds of American vessels were tied up in different English and neutral ports, and many American citizens had been forced into the British navy. On the other hand, France, feeling that the great body

of public sentiment in the country was in sympathy with her, both during the war with England and later during that with the Netherlands and Austria, committed repeated depredations upon American commerce and in numerous ways attempted to violate her neutrality. Neither country, France nor England, showed the slightest respect to the rights of America as a nation, and she was not at that time able to enforce them. At home the people were so divided in views and purposes that it was difficult to inaugurate and follow up any consistent foreign policy, although the Government had emphatically announced a course of neutrality.

In this state of affairs, it is not surprising that probably the most numerous causes coming before the Supreme Court in its early days should be those arising in admiralty. The importance with which these causes were regarded, and the careful consideration given to them, may be estimated from the numerous and able counsel who argued them, and the length of time devoted to the argument, there being not unusually engaged from four to a dozen counsel and the argument frequently consuming from nine to eleven days. In America there were no precedents to guide, hence resort had to be had to the decisions of the courts of other nations as authority, those of England taking precedence. On the Court of Admiralty of that nation at that time was sitting Sir William Scott, perhaps one of the greatest authorities on that branch of the law; and his opinions, as well as his per-

sonal advice to Jay, who, we are told, conferred with him as to the policy of the American courts on the subject, did much to aid in arriving at the principles which should guide those courts.

The first cause coming before the Supreme Court, that of Glass against the sloop *Betsy*, 3 Dallas 6, involved the jurisdiction of the District Court as a court of prize. In that cause it appeared that Capt. Pierre Arcade Johannene, commander of a French privateer, the *Citizen Genet*, had captured as prize on the high seas the sloop *Betsy*, and had sent her into Baltimore, where the owners of the sloop and her cargo filed a libel in the District Court of Maryland claiming restitution because the vessel belonged to subjects of the King of Sweden, a neutral power, and the cargo was owned jointly by Swedes and Americans. The captor filed a plea to the jurisdiction of the court, which after argument was allowed. This decision was affirmed by the Circuit Court and an appeal was taken to the Supreme Court.

The contention was made on the part of the captor that a question of prize was involved, and as the Federal courts were given power to try only "civil causes of Admiralty and Maritime Jurisdiction," and prize being not a civil cause, the court could not adjudge restitution. This position was based upon the fact that in England ordinary admiralty questions were handled by the instance court, while questions of prize were determined by specially organized prize courts. Counsel for the captor argued,

therefore, that "the jurisdiction of the admiralty courts of England and of the United States arises from the same words; but it is manifest that the latter has no jurisdiction by law but that which has been exercised by the instance court of England, which is widely different from the prize court, though the powers are usually exercised by the same person. The prize court can only have continuance during war, and derives its powers from the warrant which calls it into activity." On the other side, it was urged that admiralty is the genus, and instance and prize courts are the species, comprehended in the grant of admiralty jurisdiction, and if the district courts have no jurisdiction of prize, no such court can be established, for the constitution vests the whole power and jurisdiction in the district courts. And said they, "The act of bringing the vessel into an American port must be regarded as a voluntary election to give a jurisdiction which they might otherwise have avoided. If the American courts have no jurisdiction, the captors avoid all jurisdiction as they avoid their own country, for the attempt by a French consul to take cognizance in our ports can never be countenanced. But shall they keep the vessel and cargo here *ad libitum* and Americans, as well as neutrals, wait their motions? For it is urged that reprisals cannot issue until the courts of the captors have refused justice; and those courts cannot enquire into the merits until the vessel is brought within the jurisdiction of France. Admitting the

general position that the question of prize was one peculiarly for the determination of the courts of the country of the captor, yet it was contended that the vessel being in the jurisdiction of the Court of Maryland, that court could in the present case make inquiry and determine whether or not restitution should be made.

The arguments being concluded, after several days' consideration, Chief Justice Jay delivered the unanimous opinion of the court. It was held that every district court in the United States possessed all the powers of a court of admiralty, whether considered as an instance or as a prize court; that the court had jurisdiction competent to enquire and to decide whether, in the present case, restriction ought to be made to the claimants, or either of them, in whole or in part (that is whether such restitution can be made consistently with the law of nations and the treaties and laws of the United States); and finally, that no foreign power can of right institute, or erect, any court of judicature of any kind, within the jurisdiction of the United States, but such only as may be warranted by and be in pursuance of treaties, and hence the admiralty jurisdiction, which has been exercised in the United States by the consuls of France, not being so warranted, is not of right.

Closely following this case and especially instructive with regard to the powers exercised by Congress during the Revolution and the

Confederacy, is the case of Penhallow against Doane, 3 Dallas 54. It specifically determines the nature of a proceeding in prize and the effect of the decree of a prize court. In 1775 the Continental Congress, anticipating war with England, and the latter country at that time having already commenced attacks on American vessels, in order to counteract which the Congress was about to issue licenses to privateers to take English vessels, passed a resolution recommending to the several states that they establish prize courts for the adjudication of questions of prize which might be brought before them. The Congress reserved to itself, or to a committee of that body to be selected by it, final revision of such questions. In pursuance of this resolution the State of New Hampshire established such a court and provided for appeals to its highest state court and at the same time recognized the supervising power of Congress. Such was the state of the law.

The facts as they appeared in the case were that in October, 1777, Joshua Stackpole, a citizen of New Hampshire, commander of the privateer *McClary*, captured on the high seas a boat called the *Susanna*, belonging to the defendants in error, Doane and others. Penhallow was one of the owners of the *McClary*, he and a number of others being the plaintiffs in error. The courts of New Hampshire had adjudged the captured vessel lawful prize and refused to allow an appeal to Congress or the standing committee. An appeal was never-

theless filed with the committee, and it was still pending when the Articles of Confederation were entered into, under which a Court of Appeals was established, which was given jurisdiction in all matters respecting captures which were pending before the committee. On hearing the appeal, this court ordered restitution. The decree was never carried out, and the suit now being considered was brought to have the decree enforced by the district court as organized under the Constitution.

Justice Paterson, whose views were largely the views of the entire court, reviewing the powers of the Continental Congress, says that they were revolutionary in their nature, arising out of events adequate to every national emergency, and coextensive with the object to be attained. That in every government, whether it consists of many states or of a few, or whether it be of a Federal or consolidated nature, there must be a supreme power or will; the rights of war and peace are component parts of this supremacy, and incidental thereto is the question of prize. Referring to the country's condition and the respective powers exercised by the states and Congress, he concludes that as to war and peace, and their necessary incidents, Congress, by the unanimous voice of the people, exercised exclusive jurisdiction, and stood, like Jove, amidst the deities of old, paramount and supreme. This being true before the Confederation was entered into, there could be no question of its supremacy where it was given final and

exclusive jurisdiction by the Articles of Confederation. The conclusion was therefore reached that Congress, before and after the Articles of Confederation, had authority to institute a court of appeals, with jurisdiction to hear and determine all appeals from courts of admiralty in the respective states in cases of capture. That such court being the court of last resort, its decision was final and could not be opened or reviewed collaterally in another court as to jurisdiction, errors, or irregularities. That such errors or irregularities, even if they existed, were unavailing in this case because the proceedings were in admiralty, and the proceedings in such court being *in rem*, its sentence binds all the world as to everything contained in it, because all the world are parties to it. The sentence, so far as it goes, is conclusive as to all persons.

The jurisdiction of the district court in questions of prize being thus firmly established by these adjudications, the way was opened up for the arising of many issues under the law of nations. From the outset it was recognized as an established rule of that law that the question of whether or not a capture was lawful prize was one to be determined exclusively by the courts of the country of the captor, whose finding would be final; that if hardship or injustice resulted, the remedy was through diplomatic channels and not through the courts. Another principle equally well established was that vessels of war of a belligerent, and the

officers thereof, could not be seized or arrested at the suit of individuals to answer for damages resulting from an alleged illegal seizure by such vessels. This was the issue which came before the court in the cause of the United States against Judge Peters, 3 Dallas 121, where a prohibition was sought and issued by the Supreme Court to prevent the District Court of Pennsylvania from proceeding in a case against the *Cassius*, an armed vessel of the French Republic, which one James Yard sought to libel for the alleged unlawful capture of his vessel, the *William Lindsey*, and which last-mentioned vessel had been carried into a port of the French republic for adjudication.

In issuing the writ the court held that under the laws of nations and the treaties existing between France and this country such vessel could not be seized; that the trial of prizes taken on the high seas, without the territorial limits and jurisdiction of the United States, and brought within the dominions and jurisdiction of the said Republic for legal adjudication, by vessels of war belonging to the sovereignty of said Republic, acting under the same, and of all questions incidental thereto, does of right and exclusively belong to the tribunals of said republic and no other; that by the law of nations, the vessels of war of belligerent powers by them authorized to cruise against their enemies and to make prize of their ships and goods, may, in time of war, arrest and seize the vessels belonging to the subjects or citizens of

neutral nations, and bring them into the ports of the sovereign under whose commission and authority they act, there to answer for any breaches of the law of nations concerning the navigation of neutral ships in time of war; and the said vessels of war, their commanders, officers, and crews are not amenable before the tribunals of neutrals powers for their conduct therein, but are answerable to the sovereign in whose immediate service they were.

The right of search of neutral vessels recognized in the case last considered was expressly declared in the case of *Del Col* against *Arnold*, heard at the February term, 1796. This right, now firmly established, was a much contested question during the 18th century. England has always contended for the right. In 1780 the European nations, under the lead of Russia, all agreed to the principle that free ships should make free goods, to which principle the United States expressed its assent, but the dominance of England on the sea prevented its establishment. The principal question involved in the *Del Col* case was what should be the measure of damages for an unlawful seizure, and it was held by the court that the captors, in the case of a privateer, should be responsible for all damages resulting. The rule so laid down differed from that usually applied at that time, most of the courts limiting recovery to the amount of the bond which was given on the license being issued. The justness of the American rule cannot be questioned, for where neu-

trality is not being violated there is no reason why the innocent shipowner should be required to suffer damages from the investigation.

Another especially interesting case, because of the discussions as to the right of expatriation and the duties of neutral citizens and their rights to enter the service of belligerents, is that of *Talbot vs. Jansen*, which was heard by the court in 1795. It grew out of the capture of the Dutch vessel *Magdalena*, by two vessels which claimed to be French, which vessels were commanded respectively by Edward Ballard and William Talbot. Talbot and Ballard were both natives of the state of Virginia. The former claimed that he had renounced his allegiance to that state and was a duly naturalized citizen of the French Republic, his home being at Gaudaloupe; the latter claimed that he was not a citizen of Virginia, nor any of the American states, he having renounced his allegiance in accordance with the laws of the state of Virginia and was regularly in the French service. In 1794, Joost Jansen, the owner of the *Magdalena*, that vessel being in the harbor at Charleston, filed a libel in the District Court of South Carolina against Ballard, who was captain of the vessel called the *L'Ami de la Liberté*, in which it was alleged that Ballard, on the high seas, had captured the *Magdalena* and had taken possession of her; that the next day another armed schooner, the *L'Ami de la Point-a-Pitrie*, which was commanded by William Talbot, retook her, put a prize crew on

board, and brought her into the port of Charleston; that Ballard was an American citizen, and his vessel was American owned, and under the President's proclamation as well as the law of neutrality had no authority to make prize of the vessel in question; and asked restitution.

William Talbot filed a claim in the cause, setting up a right to the vessel as lawful prize, claiming to have taken her under his commission as a French privateer and alleging that he and the owner of the vessel which he commanded were both French citizens.

Ballard was tried at Charleston for piracy, but was acquitted under the direction of Justice Wilson, who presided at the trial. On the hearing in admiralty it appeared that Ballard, although he had declared his intention of severing his allegiance to Virginia and had complied with her laws, had never taken up his residence elsewhere and there was strong proof that his vessel was owned by an American citizen. He did not pretend to have a commission to act as privateer, but was operating under an assigned commission issued by the French Admiral, Venable, who was then in the Chesapeake Bay, authorizing the boat he was commanding to act as an advice or packet boat. It appeared that Ballard carried his boat to Savannah, where he awaited Talbot, who, after furnishing him arms, went off with him on a cruise. Under these circumstances the court held that Ballard was still an American citizen and had no right to take the vessel as prize. Said Justice Pater-

son: "Ballard was and still is a citizen of the United States, unless perchance he should be a citizen of the world. The latter is a creature of the imagination, and far too refined for any republic of ancient or modern times. If, however, he be a citizen of the world, the character bespeaks universal benevolence and breathes peace on earth and good will to men; it forbids roving upon the ocean in quest of plunder, and implies amenability to every tribunal". Discussing the right of expatriation, the court refuses to agree to the proposition that it is a personal right to be exercised at the option of the citizen. The state has an interest in its citizens and the right to demand their allegiance. An evidence of the surrender of this right must be the compliance with a valid law and permission to leave the country, duly granted. The citizen must actually leave and in good faith take up his residence elsewhere.

As to Talbot's claim, even admitting that he and his vessel were French, which was far from established, yet his co-operating with Ballard deprived him of any right to the vessel as prize. Said the court: "He provided an essential part of the outfit of Ballard's vessel. The equipment being thus completed, the two privateers went to sea. When on the ocean, they acted in concert; they cruised together, they fought together, they captured together. Under the circumstances the principles deducible from the law of nations is plain: You shall not make use of our neutral arm to capture vessels of your

enemies but of our friends. If you do, and bring the vessels within our jurisdiction, restitution will be awarded." Ballard could not claim the vessel because he was an American citizen and America was at peace with the Netherlands. Talbot could not claim it because he and Ballard attempted to commit a fraud on the neutrality of America. Judgment of restitution was therefore given.

The cause is interesting as recognizing a salutary rule of international law. In writing on this same subject, Vattel, a great authority, says: "An individual may, with a safe conscience, serve his country by fitting out privateers; but it is inexcusable and base to take a commission from a foreign prince to prey upon the subjects of a state in amity with his native country." The question has long since been settled in this country by an Act of Congress which was passed in 1818, prohibiting any citizen from accepting within the jurisdiction of the United States a commission, or for any person not transiently within the United States to consent to be retained or enlisted to serve a foreign state in war against a government in amity with her, or to be concerned within the limits of the United States, in fitting out or otherwise assisting any private vessel of war to cruise against subjects of friendly powers.

This is a part of the record (covering, as we conceive them to be, the most important cases) made by the Supreme Court on this branch of the law during the period being considered.

When it is remembered that it covers only ten years, and that during the very infancy of the government and the court, it is far from unimportant. An examination of the opinions evidence the establishment of several fundamental principles of international law and the laying of the foundation for the pursuit of a definite international policy. With the growth of the nation, other serious problems will arise in admiralty and important causes be considered; but with these established principles as a starting point, and the jurisdiction of the district court in both prize and ordinary admiralty matters firmly adjudged, their solution will be much facilitated. Not only so, but especially important was the effect of these decisions at the time of their rendition in checking the intrigues and plans of Citizen Genet, the French minister, and his successors, and calling the French sympathizers in the States to their duty to their own country. There will still be much conflict, but plans for French aid will bear the mark of illegality. They further recognized the fact that if America was to be a nation, she must maintain her sovereignty and abide by her treaties and declarations of neutrality. She must keep faith with the world. The declarations contained in these causes, coming as they did from her highest court, asserted to the nations that such was her intention, even though it should become necessary, as was the case only a few years later with regard to both France and England, to secure the same by force.

CHAPTER VII

CONCLUSION

From the August term, 1792, at which point a chronological statement of the proceedings of the court was dropped, up to 1800, in addition to the causes already considered, there were determined numerous cases involving general law and questions of practice. Especially with regard to the latter was there considerable clarification. Methods of appeal, the nature of writs of error, preparation of causes for appeal, and numerous other matters were ascertained. To specify particulars, however, would now scarcely be profitable since in more recent times modes of procedure have been greatly modified and many of the rules and decisions of that time rendered obsolete.

During that period, too, the personnel of the court had been almost entirely changed, Justice Cushing being the only one of the first appointees to hold beyond it. Chief Justice Jay in 1794, at the solicitation of President

Washington, had undertaken a special mission to England, with which country our relations had become so strained that war seemed inevitable, for the purpose of attempting to arrive at some amicable adjustment of mutual grievances. On his return, after having concluded his famous treaty, he found that in his absence he had been elected Governor of New York and resigned his Chief Justiceship to accept that position.

In his stead the President appointed John Rutledge of South Carolina, who presided at the August term, 1795. Rutledge had studied law in England and had commenced the practice of that profession in Charleston in 1761. He was a zealous patriot and because of his fine personality and intellect, and especially because of his unusual oratorical powers, took a leading part in the political affairs of the state and nation. In 1765 he was a member of the Stamp Act Convention in New York, and in 1774 of the first Continental Congress in Philadelphia. Patrick Henry, who was an excellent judge of such matters, said of him that he was by far the greatest orator in the Continental Convention. Chairman of the committee that framed a constitution for South Carolina in 1776, he became that state's first governor, which position he held with some few intervals during the greater part of the Revolutionary War. The confidence imposed in him is exhibited by the fact that in 1780 the legislature of the state, being then about to adjourn,

passed an Act giving him for two years "a power to do anything necessary for the public good except the taking away the life of a citizen without legal trial." He was state chancellor, a member of the Federal Constitutional Convention, and of the state convention which ratified the Constitution. Although having this extraordinary record, and having been appointed and in the performance of his duties as Chief Justice, the Senate refused to confirm him. The reason seems uncertain. Some authorities say because of the fact that his mind had become diseased. Others claim that it was because of his announced opposition to Jay's treaty and his bitter denunciation of Jay himself. The probabilities are that the latter was the real cause, for it is a known fact that he opposed the treaty strenuously, and the Senate, being largely Federal and in favor of the treaty, would scarcely be in sympathy with him or his views.

Of Oliver Ellsworth, who was nominated and promptly confirmed for the position, a recent biographer says that he narrowly missed being a minister, he having been sent to Yale with that purpose in view. He changed his mind, however, studied law, and became a successful lawyer, politician, and judge. Born in Connecticut, he was admitted to the Bar of that state in 1771. A few years later, after having served his county in the state legislature, he became a member of the Continental Congress. From 1780 to 1784 he was a member of the council of the Governor of Connecticut. Subsequently

being appointed a member of the Superior Court of that state, he resigned to become a member of the Constitutional Convention. In the convention he took a prominent part, contending strenuously for what he conceived to be a proper representation of the smaller states in the national government, but yet often acting as mediator in the heated controversies that arose in that assembly. On ratification of the Constitution he became one of Connecticut's first senators and was chairman of the senatorial committee that framed the Federal Judiciary Act. Becoming a strong Nationalist, he supported in the Senate, in which body he seems to have been a leader, Hamilton's Funding Bill, the National Bank Act, Jay's Treaty, and many other measures looking to the development of the powers of the National Government. Appointed Chief Justice in 1796, he held that position until 1800. In the latter part of 1799 he was appointed by President Adams as the head of a commission to France to try to settle the continuing difficulties with that government which the Marshall commission had several years previously failed to adjust. Becoming ill while there, he resigned from the Supreme Court Bench and went to England to recuperate. Returning home in 1801 he again became a member of the Governor's council, and in 1807 was made Chief Justice of the Supreme Court of Connecticut.

On his resignation of the Chief Justiceship, President Adams reappointed Jay and tried

to get him to resume the duties of that position. In replying to the President declining the appointment, he thus expressed his views of the court: "I left the Bench perfectly convinced that under a system so defective it would not obtain the energy, weight, and dignity which was essential to its affording due support to the National Government, nor acquire public confidence and respect which, as the last resort of the justice of the nation, it should possess. Hence I am induced to doubt both the propriety and the expediency of my returning to the Bench under the present system. . . . Independent of these considerations the state of my health removes every doubt." Such being his views, how fortunate for the country that he declined the position, and the ermine fell upon the broad shoulders of President Adams' Secretary of State, John Marshall, who had the energy, ability, and vision to give real life to the court. How strange, too, do such views seem to-day when we see the court of which he was writing almost universally recognized as the most august judicial body in existence.

As to the associate justices: William Paterson of New Jersey was appointed on the fourth of March, 1793, to succeed Justice Johnson, who had resigned. His actual service on the Supreme Bench, however, did not begin until the February term, 1794, since the August term of the previous year was interrupted by a fever plague in the city of Philadelphia that year, which proved

fatal to thousands and caused the great body of the people to leave the city. His unusual ability is evidenced by his opinions, which are clear, logical, and learned. Having studied at Princeton he was admitted to the bar in November, 1767. He was secretary of the State Convention which on July the second, 1776, adopted a constitution for the state of New Jersey. In September following, he was appointed state attorney-general and held that position during the entire Revolution. He was active in forwarding the movement which resulted in the National Constitutional Convention and became a member of that body. He was the proponent of the New Jersey plan of union and fought strenuously to obtain for the smaller states equal representation with the larger ones in the government about to be established. Elected to the Federal Senate, he was appointed a member of the committee to frame the Judiciary Act, and to him and Ellsworth credit for the resulting bill is usually given. In 1790 he became governor and state chancellor, in which last-mentioned capacity he did much to revise the laws of his state. Placed on the Supreme Bench in 1793, he continued to hold that position until his death in 1806.

John Blair's successor, Samuel Chase, appointed in 1796, was an unusual character. Of fine judicial ability he had a violent temper and seemed to take an especial delight in antagonizing those whose views did not coincide

with his own. To such an extent was this latter characteristic exhibited on the Circuit Bench that when Jefferson and his followers instituted their famous attack on the Federal judiciary he seemed to offer the most vulnerable spot for the commencement of the contest. His impeachment and subsequent acquittal for improper conduct in the trial of the cases against Fries and Callender constitute one of the most interesting chapters in American history. That came, however, after the period we are considering and does not constitute a part of its history.

That he was a strong judge and conscientious patriot, no one will question. Born in Maryland in 1741, he studied law and rose rapidly in the profession. A member of the Continental Congress from 1774 to 1778, he was also one of the signers of the Declaration of Independence. He was a member of the Maryland Constitutional Convention called to pass on the adoption of the Federal Constitution, and fought strenuously against its adoption. In 1791 he became Chief Justice of the General Court of the State of Maryland.

After his appointment on the Federal Bench his political views seem to have undergone a decided change and instead of criticizing the Constitution he became one of its most ardent supporters. In fact, he became a strong Federalist, and as a trial judge on the Circuit Bench took advantage of every opportunity to promulgate the principles of that party, very much

to the disgust and anger of the Republicans. His courage was boundless and his power of sarcasm great.

The foregoing constitute the Justices who heard the causes we have reviewed. No other vacancy took place until the close of the year 1798, when James Wilson, being then only in his fifty-sixth year of age and apparently in the prime of his physical and mental vigor, while holding the Circuit Court in North Carolina was attacked by a serious illness and hastened to the home of his old friend, Justice Iredell, at Edenton, where he died on August the twenty-eighth. "There," says a biographer, "he was laid to rest, far from the scenes of his active life, and further still from the land of his birth." The next year he was followed by Justice Iredell.

President Adams insisted on Marshall accepting the position made vacant by the death of Wilson. At the same time Washington called him to Mount Vernon and insisted on his running for Congress, urging that more important service could be rendered in the latter position at that time. Marshall decided to follow Washington's advice and recommended that Bushrod Washington, a nephew of the ex-president, be appointed associate justice. The suggestion was a happy one, since Washington had studied law in Wilson's office and had been trained by him, and no doubt imbibed many of his views. He was therefore appointed. To succeed Iredell, William Johnson of South Carolina was nominated and confirmed. Both of these belong

to the subsequent period and will not be considered further.

Such was the record of the court, such the standing and accomplishments of the justices who composed it. President Washington, it is said, was especially interested in the Federal Supreme Court and frequently asserted that in years to come it would be an institution of unsurpassed respect and influence, power and dignity; that with this idea in mind he tried to appoint to the Bench only those who would adorn it with wisdom, virtue, and intelligence. That he was wise in his appointments, few will doubt; that his hopes have been justified, still fewer will question. With the passing of time, and with repeated reference to the great opinions involving the more practical issues of everyday life, the profession is prone to overlook the services rendered by those pioneers in the formative days of the court when everything was new and there were no rules of practice nor precedents to guide. To refresh the mind as to these efforts is the purpose of this work.

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